Supreme Court of Wisconsin

DIRECTOR OF STATE COURTS
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Shirley S. Abrahamson
Chief Justice

16 East State Capitol
Telephone 608-266-6828
Fax 608-267-0980

A. John Voelker
Director of State Courts

Testimony
Of
Nancy M. Rottier
Legislative Liaison
Director of State Courts

in Opposition to

September 2011 Special Session Senate Bill 12

Senate Committee on Judiciary, Utilities, Commerce, and Government Operations
Sen. Rich Zipperer, Chair
October 19, 2011

Thank you, Chairperson Zipperer and members of the Committee. I am Nancy M. Rottier, the Legislative Liaison for the Director of State Courts. I am appearing on behalf of the Legislative Committee of the Wisconsin Judicial Conference to express its opposition to September 2011 Special Session Senate Bill 12 regulating attorney fees in certain legal actions.

The Wisconsin Judicial Conference is composed of all appellate and circuit court judges in Wisconsin. The Legislative Committee is the Judicial Conference's elected committee of judges who examine legislation to determine its impact on the court system.

The Legislative Committee opposes SB 12 for two reasons: (1) it will limit access to the court system; and (2) the factors listed in Section 1 include new factors beyond those a court currently considers in ruling on the reasonableness of attorney fees.

Limiting Access

The Legislative Committee believes SB 12 will limit access of persons with valid but small dollar claims to the court system because they will be unable to hire attorneys to bring their actions.

The statutes govern attorney fees in different ways. Under s. 814.04(1), Stats. a successful litigant is entitled to a fixed dollar amount of attorney fees based on the amount recovered. These are usually referred to as statutory attorney fees. They are not affected by SB 12.

There are a variety of other statutes that allow for the recovery of reasonable attorney fees beyond the statutory amounts in s. 814.04. I have attached to my testimony a list of statutes that allow for such fees. (This list is taken from the Wisconsin Judicial Benchbook Series, Volume II – Civil, prepared by the Wisconsin Court System's Office of Judicial Education, Chapter 23, page 6.)

The Wisconsin Supreme Court has long recognized that these fee-shifting statutes allow attorneys to pursue meritorious claims that have little monetary value. In some instances these statutes incorporate the idea of a "private Attorney General," that is, a private citizen enforcing laws or pursuing rights that benefit society as a whole, in a situation where limited time and resources do not allow the Attorney General to act.

SB 12 would create a presumption that the award of attorney fees in these actions could not exceed 3 times the amount of compensatory damages, unless the parties prove to the court that a greater amount is reasonable. There is little doubt that this presumption would become the general rule and would serve as a deterrent to attorneys taking cases with a low monetary value.

Factors to Determine Reasonableness

The second reason the Legislative Committee opposes SB 12 is that Section 1 includes new factors beyond those a court currently considers in ruling on the reasonableness of attorney fees.

As part of its constitutional responsibility to supervise the practice of law, the Supreme Court has adopted Chapter 20 of the Supreme Court Rules entitled Rules of Professional Conduct for Attorneys. These extensive rules, governing all areas of legal practice, were developed over many months by the State Bar's Wisconsin Ethics 2000 Committee and many more months of consideration by the Supreme Court in public hearing and open administrative conference. The rules are modeled after the American Bar Association's model rules of conduct but localized to fit Wisconsin.

In Chapter 20:1.5 of the Supreme Court rules, the Court has set out 8 factors to be considered in determining reasonableness of all attorney fees, not just those involved in these types of cases. The 8 factors in the Court's rule appear in SB 12, in proposed s. 814.045 (1) (a) through (k). I have also attached that part of SCR 20 to my testimony.

But SB 12 also contains 4 more factors that are currently not part of the rules. These factors have not been vetted as part of case law and as part of this long process of adopting the rules. It will take time – and ironically, more litigation – for judges and lawyers to determine the exact meaning and impact of these factors.

Therefore, we would suggest, if the Legislature does adopt SB 12, it have the factors to be considered mirror those in SCR 20:1.5.

For these reasons, we urge you to reject SB 12, or, at a minimum, change section 1. I would be happy to answer any questions you may have. Thank you.

— Atty fees should be capable of being "shifted with some exactitude to those benefitting"

2) Statutes allowing for Atty fees beyond the statutory amounts in § 814.04

14.11(2)	Special State Counsel
17.11(2)	District Atty, Temporary
17.14(4)	Removal of Assessor or Other Officer
19.37(2)	Public Records, Mandamus Action to Release
32.28(1)	Eminent Domain, Recovery of Reasonable Atty (and Other) Fees
51.61(7)(a)	Mental Health Act, Violation of Patients' Rights, See *Wright v. Mercy Hosp*, 206 W2d 449 (CA 1996)
75.42(2)	Tax Deed, Action Under
102.26	Worker's Compensation Cases
103.56(5)	Labor Dispute Case
108.09(8)	Unemployment Insurance Cases
109.03(6)	Wage Claim
128.17(1)	Creditors' Actions
218.0163(2)	Defective Used Vehicles
227.485	Individual, Small Business, Small Nonprofit Corp Contested Case Against State Agency
403.604(1)	Commercial Paper, Tender of Payment as Affecting Liability for Fees
422.411	Consumer Credit Transactions, Limits on Agreements for
425.308	Actions in Which Customer Prevails
428.103(1)(e)	Foreclosure on First Lien Real Estate
618.48	Unauthorized Insurers
645.54(10)	Insurer's Liquidation Proceedings
655.013	Health Care Liability Actions
757.36–.37	Lien Enforcement
757.48	Guardian ad Litem
757.99	Judicial Misconduct and Permanent Disability Proceedings
767.241	Actions Affecting Families
767.264(2)	Divorce Action, Dismissal
799.25	Small Claims Actions in Circuit Court
814.08	Municipal Court, Appeal from
814.46–.47	When Collected
842.21	Partition
851.40, 865.16(1m)	Probate Proceedings
879.37	Will Contests
946.87(4)	Racketeering Violations
949.14	Victims of Crimes

Also, Federal causes of action, See Sec. 1983, CV 45

3) Calculation of reasonable Atty fees

Kolupar v Wilde Pontiac Cadillac, Inc
2004 WI 112, 275 W2d 1

a. Starting point is lodestar. Lodestar is number of hours reasonably expended on litigation multiplied by reasonable hourly rate

b. But Ct must also adjust this lodestar figure up or down to account for SCR 20:1.5 factors

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

SCR 20:1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b)(1) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, , except before or within a reasonable time after commencing the representation when the lawyer will charge a regularly represented client on the same basis or rate as in the past. If it is reasonably foreseeable that the total cost of representation to the client, including attorney's fees, will be $1000 or less, the communication may be oral or in writing. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

(2) If the total cost of representation to the client, including

attorney's fees, is more than $1000, the purpose and effect of any retainer or advance fee that is paid to the lawyer shall be communicated in writing.

(3) A lawyer shall promptly respond to a client's request for information concerning fees and expenses.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by par. (d) or other law. A contingent fee agreement shall be in a writing signed by the client, and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:

(1) in any action affecting the family, including but not limited to divorce, legal separation, annulment, determination of paternity, setting of support and maintenance, setting of custody and physical placement, property division, partition of marital property, termination of parental rights and adoption, provided that nothing herein shall prohibit a contingent fee for the collection of past due amounts of support or maintenance or property division.

(2) for representing a defendant in a criminal case or any proceeding that could result in deprivation of liberty.

(e) A division of a fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

(1) the division is based on the services performed by each lawyer, and the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; or

(2) the lawyers formerly practiced together and the payment to one lawyer is pursuant to a separation or retirement agreement between them; or

(3) pursuant to the referral of a matter between the lawyers, each lawyer assumes the same ethical responsibility for the representation as if the lawyers were partners in the same firm, the client is informed of the terms of the referral arrangement, including the share each lawyer will receive and whether the overall fee will increase, and the client consents in a writing signed by the client.

WISCONSIN COMMITTEE COMMENT

Paragraph (b) differs from the Model Rule in requiring that fee and expense information usually must be communicated to the client in writing, unless the total cost of representation will be $1000 or less. In instances when a lawyer has regularly represented a client, any changes in the basis or rate of the fee or expenses may be communicated in writing to the client by a proper reference on the periodic billing statement provided to the client within a reasonable time after the basis or rate of the fee or expenses has been changed. The communication to the client through the billing statement should clearly indicate that a change in the basis or rate of the fee or expenses has occurred along with an indication of the new basis or rate of the fee or expenses. A lawyer should advise the client at the time of commencement of representation of the likelihood of a periodic change in the basis or rate of the fee or expenses that will be charged to the client.

In addition, paragraph (b) differs from the Model Rule in requiring that the purpose and effect of any retainer or advance fee paid to the lawyer shall be communicated in writing and that a lawyer shall promptly respond to a client's request for information concerning fees and expenses. The lawyer should inform the client of the purpose and effect of any retainer or advance fee. Specifically, the lawyer should identify whether any portion, and if so what portion, of the fee is a retainer. A retainer is a fee that a lawyer charges the client not for specific services to be performed but to ensure the lawyer's availability whenever the client may need legal services. These fees become the property of the lawyer when received and may not be deposited into the lawyer's trust account. In addition, they are subject to SCR 20:1.15 and SCR 20:1.16. Retainers are to be distinguished from an "advanced fee" which is paid for future services and earned only as services are performed. Advanced fees are subject to SCR 20:1.5, SCR 20:1.15, and SCR 20:1.16. See also State Bar of Wis. Comm. on Prof'l Ethics, Formal Op. E-93-4 (1993).

Paragraph (d) preserves the more explicit statement of limitations on contingent fees that has been part of Wisconsin law since the original adoption of the Rules of Professional Conduct in the state.

Paragraph (e) differs from the Model Rule in several respects. The division of a fee "based on" rather than "in proportion to" the services performed clarifies that fee divisions need not consist of a percentage calculation. The rule also recognizes that lawyers who formerly practiced together may divide a fee pursuant to a separation or retirement agreement between them. In addition, the standards governing referral arrangements are made more explicit.

Dispute Over Fees

Arbitration provides an expeditious, inexpensive method for lawyers and clients to resolve disputes regarding fees. It also avoids litigation that might further exacerbate the relationship. If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. See also ABA Comment [9].

Fee Estimates

Compliance with the following guidelines is a desirable practice: (a) the lawyer providing to the client, no later than a reasonable time after commencing the representation, a written estimate of the fees that the lawyer will charge the client as a result of the representation; (b) if, at any time and from time to time during the course of the representation, the fee estimate originally provided becomes substantially inaccurate, the lawyer timely providing a revised written estimate or revised written estimates to the client; (c) the client accepting the representation following provision of the estimate or estimates; and (d) the lawyer charging fees reasonably consistent with the estimate or estimates given.

ABA COMMENT

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

WISCONSIN ASSOCIATION *for* JUSTICE

J. MICHAEL END
PRESIDENT
MILWAUKEE

EDWARD J. VOPAL
PRESIDENT-ELECT
GREEN BAY

JEFFREY A. PITMAN
VICE-PRESIDENT
MILWAUKEE

CHRISTOPHER D. STOMBAUGH
SECRETARY
PLATTEVILLE

ANN S. JACOBS
TREASURER
MILWAUKEE

PAUL GAGLIARDI
PAST PRESIDENT
SALEM

JANE E. GARROTT
EXECUTIVE DIRECTOR

Testimony of Edward Vopal on behalf of the Wisconsin Association for Justice

2011 Special Session Bill 12
October 19, 2011

My name is Edward Vopal. I am a partner in the Habush, Habush & Rottier law firm in Green Bay, Wisconsin and the president-elect of the Wisconsin Association for Justice (WAJ). Thank you for the opportunity to testify against Special Session Bill 12.

Access to justice is a very important issue to the Wisconsin Association for Justice. Our group's mission includes promoting a fair and effective justice system – one that ensures justice for all, not just a privileged few. Special Session bill 12 is the antithesis of this goal. The most offensive provision caps attorney fees at three times the amount of a compensatory award. This section will impact people who have been wrongly terminated from a job and many consumer cases.

Numerous consumers are taken advantage of from companies with unfair business practices or fired from a job improperly may not be able to seek representation from experienced attorneys who can help them recover their money or lost wages. This bill is unfair and unjust.

The award of attorney fees "supplies the teeth" to enforcing consumer laws in Wisconsin. Without it, access to the courts by injured consumers is reduced. In fact, Wisconsin Attorney Generals from Bronson LaFollette to J. B. Van Hollen have recognized that "private consumer actions remain an essential component of the enforcement scheme" of Wisconsin's consumer laws.

In *Shands v. Castrovinci,* 115 Wis. 2d 352, 340 N.W.2d 506 (1983), the Wisconsin Supreme Court outlined the importance of awarding attorney fees in consumer cases.

- It encourages attorneys to pursue claims to enforce consumer rights where the anticipated monetary recovery would not justify the expense of legal action.
- It recognizes the role that attorneys play in acting as "private attorney's general" to enforce consumer rights. The individual rights are enforced, "but the aggregate effect of individual suits enforces the public's rights."
- It provides a deterrent effect against bad actors if they know they will be subject to double damages and paying attorney fees.
- With the sheer number of violations, state enforcement is not possible in every case. The award of attorney fees provides "a necessary backup" that reinforces the state's enforcement powers under Wisconsin consumer laws.

The award of attorney's fees is the mechanism used to remedy and enforce important consumer protections from unlawful acts of others by shifting the cost of enforcement to the wrongdoer rather than the individual harmed or to the state. Limiting fees to three times the damages weakens this enforcement mechanism.

This bill only caps a consumers' attorney's fees. It does nothing to cap the fees the wrongdoers can spend to defend a case. It also has a perverse incentive. If a wrongdoer knows that the attorney's fees are capped at three times the amount of the compensatory award, he or she can drive up the expenses knowing the consumer has no recourse and may lose his or her attorney.

The types of cases that are impacted are the subject of thousands of consumer transactions in a year:

Motor vehicle repairs
Residential rental practices
Direct Marketing
Telecommunications Services
Mobile home parks
Lemon law
Fraudulent Sales
Property damage or loss caused by a crime
Violations of Wisconsin's Consumer Act

The cap on attorney fees in Special Session bill 12 conflicts with the provision awarding attorney fees under the Consumer Act. In Wis. Stat. § 425.308, the statute provides that the "award of attorney fees **shall be** in an amount sufficient to compensate attorneys representing customers in actions arising from consumer transactions." In addition, the factors for determining the reasonableness of the fees are different:

a. The time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause;

b. The customary charges of the bar for similar services;

c. The amount involved in the controversy and the benefits resulting to the client or clients from the services;

d. The contingency or the certainty of the compensation;

e. The character of the employment, whether casual or for an established and constant client; and

f. The amount of the costs and expenses reasonably advanced by the attorney in the prosecution or defense of the action.

How are judges supposed to reconcile these two provisions?

In addition, our courts already have designated factors for determining the reasonableness of attorney fees, SCR 20:1.5(a). Many of the factors are the same as in the legislation. However, the bill adds several additional factors that appear to already be covered or add confusion to the awarding of attorney's fees:

(L) The complexity of the case.

(m) Awards of costs and fees in similar cases.

(n) The legitimacy or strength of any defenses or affirmative defenses asserted in the action.

(p) Other factors the court deems important or necessary to consider under the circumstances of the case.

Complexity already appears to be covered under the factor includes "difficulty of the questions involved in the action."

Controversy may arise when judges are asked to determine the legitimacy or strength of defenses. What is the purpose? Can an person recover more money if the defenses are weak? It is unclear the purpose of this item.

Finally, how will judges know the award of attorney fees and costs in other cases? As far as we are aware there is no tracking system for this.

Judges already carefully scrutinize the award of attorney fees in current cases. WAJ believes this function should remain with courts since they are the ones that know the litigants, know how the case was handled, and can fairly judge a proper award.

To summarize, the Special Session bill 12 adds confusion to already existing rules for the awarding of attorney fees in consumer cases. It will render toothless Wisconsin consumer laws and leave many people without legal representation. Capping attorney's fees in consumer and employment cases will discriminate against those least able to afford it. It does great harm to the pillar of our democratic system of government that Americans believe in, "justice for all."

Attorneys fees awarded by statute or contract are taxable costs in Wisconsin under Wis. Stat. §814.04(2), and therefore subject to Wis. Stat. §807.01.

> The language of Wis. Stat. § 814.04 supports our interpretation of the federal statute that attorneys' fees awarded pursuant to 42 U.S.C. § 1988(b) are costs. Section 814.04 sets forth the specific items of costs that are recoverable as taxable costs in civil proceedings. Section 814.04(2) states that statutorily approved costs include "[a]ll the necessary ... fees allowed by law." Although this court has not heretofore considered the specific issue whether § 1988(b) attorneys' fees are "necessary fees allowed by law," we conclude that they are.

Hartman v. Winnebago County, 216 Wis.2d 419, 432, 574 N.W.2d 222, 228 - 229 (1998)[footnote omitted].

> The court went on to "recognize" that the use of the word "cost" in the federal statute did not conclusively establish that the attorneys' fees should be deemed a taxable "cost" under Wis. Stat. § 806.06(4). *Id.*[*Hartman v. Winnebago County*, 216 Wis.2d 419, 574 N.W.2d 222 (1998)] at ¶¶ 23- 24, 574 N.W.2d 222. Rather, the court concluded that it must "determine if any Wisconsin statute authorizes an award of attorneys' fees under § 1988 as a taxable cost." *Id.* at ¶ 25, 574 N.W.2d 222. It then examined the language of Wis. Stat. § 814.04(2) providing that "statutorily approved costs include '[a]ll the necessary ... fees allowed by law.' " *Id.* at ¶ 26, 574 N.W.2d 222. The court concluded that the attorneys' fees authorized under the federal statute "are allowed by law" and that they "are a 'necessary' cost of litigation to which a prevailing party is entitled." *Id.* at ¶ 27, 574 N.W.2d 222.

Purdy v. Cap Gemini America, Inc. 2001 WI App 270 ¶12, 248 Wis.2d 804, 813, 637 N.W.2d 763,767 - 768.

> We can find no basis to conclude that the fees Purdy claims under his employment agreement are any less "allowed by law" or a "necessary cost of litigation" than were the fees sought by the plaintiff in Hartman. Nothing in Wis. Stat. § 814.04, or in the supreme court's analysis of that section in *Hartman*, suggests that a distinction should be made between a claim for attorneys' fees based on a contract as opposed to one based on a statute. If a party's contractual entitlement to actual attorneys' fees is contested, we see no reason why a dispute regarding a party's entitlement to fees, or the reasonable amount thereof, cannot be addressed within the context of Wis. Stat. § 806.06(4). This could occur, either by a timely objection and judicial resolution of the issue under Wis. Stat. § 814.10, or, as the supreme court noted in Hartman, by a timely request to postpone consideration of the fees issue until such time as the dispute may be fully resolved.

Purdy v. Cap Gemini America, Inc. 2001 WI App 270 ¶15, 248 Wis.2d 804, 815, 637 N.W.2d 763,768 - 769.

> The phrase "taxable costs" in Rule 807.01(3) means those costs "allowed as items of cost

under" Wis. Stat. Rule 814.04. *Prosser v. Leuck*, 225 Wis.2d 126, 146, 592 N.W.2d 178, 186 (1999). We are aware of nothing that indicates that the word "costs" in the first part of Rule 807.01(3) means anything other than "taxable costs." Costs recoverable under Rule 814.04 include "fees allowed by law." Rule 814.04(2).

Alberte v. Anew Health Care Services, Inc., 2004 WI App 146 ¶5, 275 Wis.2d 571, 577, 685 N.W.2d 614, 617.

> Indeed, we have recognized that *Hartman* "did not find the use of the word cost in [§ 1998(b)] decisive ... but focused instead on whether the requested attorneys' fees were allowed by law and whether they represented a necessary cost of litigation to which a prevailing party is entitled under Wis. Stat. § 814.04(2)." *Purdy v. Cap Gemini Am., Inc.*, 2001 WI App 270, ¶ 13, 248 Wis.2d 804, 814, 637 N.W.2d 763, 768 (claims for attorney's fees permitted by contract are "costs" that must be taxed within the time set by Rule 806.06(4)) (quoting *Hartman*, 216 Wis.2d at 432, 574 N.W.2d at 228-229) (internal quotation marks omitted). In light of this, Alberte is entitled to her reasonable attorney's fees as an item of costs under Rule 814.04(2) as provided for by Wis. Stat. Rule 807.01(3).

Alberte v. Anew Health Care Services, Inc., 2004 WI App 146 ¶11, 275 Wis.2d 571, 582-583, 685 N.W.2d 614,619 - 620.

Dobbratz contends that its situation is unlike *American Motorists* because attorney fees and costs are expressly provided for by the Lemon Law. See Wis. Stat. § 218.015(7). We do not see the significance of that distinction. *American Motorists* rejected a "total amount of the judgment" view of "amount recovered," which Dobbratz suggests we adopt. Although not stated explicitly in the opinion, *American Motorists* implied that it adopted an interpretation of "amount recovered" to mean damages. *Nelson* further supports this view. There, the court concluded that "amount recovered" meant "that portion of the verdict for which a party is responsible." *Nelson*, 211 Wis.2d at 501, 565 N.W.2d 123 (emphasis added). These cases support a conclusion that attorney's fees and costs, regardless why they are awarded, are not part of the "amount recovered," but rather are a shifting of the costs of litigation, and separate from recovery. The circuit court did not err in excluding attorney's fees and costs from the amount recovered.

Dobbratz Trucking & Excavating, Inc. v. PACCAR, Inc., 2002 WI App 138¶ 31, 256 Wis.2d 205, 647 N.W.2d 315.

¶ 51 However, Pachowitz sued LeDoux under Wis.Stat. §895.50, which specifically provides for compensatory damages and "[a] reasonable amount for attorney fees." We conclude that when a defendant is sued under a fee shifting statute, that party is on notice that the plaintiff is seeking not only damages but also reasonable attorney fees. Accordingly, when making an offer of judgment, the defendant is properly held to include such fees and to so inform the plaintiff. From that it logically follows that the trial court should also include attorney fees in the judgment when it measures the offer against the judgment. Here, LeDoux's offer of judgment said nothing of attorney fees. Instead, it was limited to compensatory damages costs and disbursements.FN14 As noted, it is the obligation of the party making offer to do so in clear and unambiguous terms, *Ritt*, 199 Wis.2d at 76, thereby allowing the plaintiff to "fully and fairly evaluate the offer from his [or her] own independent perspective." *Testa*, 164 Wis.2d at 302. LeDoux's offer of judgment did not live up to these standards. At best, it was a partial settlement offer relating only to compensatory damages, costs and disbursements. But Wis.Stat. §807.01 does not envision partial settlements; it envisions complete settlements.

¶ 52 We hold that LeDoux's offer of judgment was invalid because it failed to include an allowance for Pachowitz's reasonable attorney fees. We further hold that the trial court properly included such fees in the judgment when measuring the offer against the judgment. Therefore, the trial court properly denied the appellants' application for costs under Wis. Stat. § 807.01(1).

Pachowitz v. Ledoux, 2003 WI App 120 ¶¶51-52, 265 Wis.2d 631, 666 N.W.2d 88.

807.01(1)
(1) After issue is joined but at least 20 days before the trial, the defendant may serve upon the plaintiff a written offer to allow judgment to be taken against the defendant for the sum, or property, or to the effect therein specified, with costs. If the plaintiff accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the plaintiff may file the offer, with proof of service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of judgment is not accepted and the plaintiff fails to recover a more favorable judgment *then that which, including accrued prejudgment interest and costs, could have been awarded on the day of the offer of settlement*, the plaintiff shall not recover costs but defendant shall recover costs to be computed on the demand of the complaint, *as though it were successful as the plaintiff.*

* * *

807.01(3)
(3) After issue is joined but at least 20 days before trial, the plaintiff may serve upon the defendant a written offer of settlement for the sum, or property, or to the effect therein specified, with costs. If the defendant accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the defendant may file the offer, with proof of service of the notice of acceptance, with the clerk of court. *If the accepted offer is for a sum of money, the sum shall be paid within 15 days of acceptance, or the plaintiff may, at their option, either request judgment upon the settlement agreement or void the agreement. If notice of acceptance is given, and the settlement sum is not paid within 15 days, the offer and its acceptance shall be admitted as evidence at trial, if offered by the Plaintiff.* If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of settlement is not accepted and the plaintiff recovers a more favorable judgment, the plaintiff shall recover double the amount of the taxable costs.

807.01(4)
(4) If there is an offer of settlement by a party under this section which is not accepted and the party recovers a judgment, *less prejudgment interest and costs accrued after the date of the offer of settlement*, which is greater than or equal to the amount specified in the offer of settlement the party is entitled to interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid to the *appropriate party, or into court as security for the judgment pending disposition and any appeal. Interest under this section is in addition to any other compensation allowed by law or contract*, but in lieu of interest computed under ss. 814.04 (4) and 815.05 (8). *Taxable Costs under this section include attorneys fees awarded by statute, contract, or common law. In any offer made under this section, the offerer may include a provision that the costs specified in the offer may be determined by the court, after acceptance.*

Case 07CV0795 settled as follows:

(1) Def to pay 22,250.00 in full settlement within 30 days. If not paid timely judgment ~~on~~ to be entered for 27,250.00 plus costs & disbursements.

(2) Both parties hereby release all claims against each other.

(3) Action to be dismissed on the merits & without costs, to be reopened for entry of judgment upon default

(4) Def to have until noon on ~~8-7-07~~ 8-8-07 to revoke this settlement agreement by fax to pl's atty at 262 547-6195

8·7·07

[signature] 8-7-07
[signature]

[signature] 08/07/07
[signature] 08/07/07

STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY

RANDY W. KASKIN,
Plaintiff
vs.
JOHN LYNCH CHEVROLET-PONTIAC SALES, INC.
Defendant

DECISION ON ATTORNEY FEES

Case No. 07-CV-795

This matter is before the court for a determination of reasonable attorney fees pursuant to Wis. Stat. §100.20(5) in the wake of the settlement of this consumer protection case. The parties settled this action for $12,500, and stipulated that .... "the plaintiff shall be entitled to further proceedings on a reasonable attorney fee as if an administrative code violation had been found under Wis. Stat. 100.20(5)...." Plaintiff's request for legal fees through November 20, 2009 (prior to the completion of argument and briefing on this issue) sought payment for 706 hours of legal work for a total of $209,361.50. Between November 23, 2009 and the time of oral argument on this motion, plaintiffs billed another $4,700, primarily related to defendant's motion to compel regarding a fee agreement. Defendant counters that the fees should more appropriately be set between $50,000 and $60,000. Defendant does not contest plaintiff's requested costs of $5,283.51.00.

While the parties strenuously disagree with respect to the amount of attorney fees to be awarded, including determinations of a reasonable hourly rate and number of hours expended, there is no substantial disagreement regarding the methodology to be followed by the court in making its findings. Pursuant to ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, 275 Wis.2d 1, the court applies the "lodestar methodology". As a starting point, the trial court first must multiply the number of hours reasonably expended on the litigation by a reasonable hourly

rate. The court then may make upward or downward adjustments based on any factors in SCR 20:1.5(a) that in the court's discretion are relevant. See ***Anderson v. MSI Preferred Ins. Co.,*** 2005 WI 62, 281 Wis.2d 66; ***Stuart v. Weisflog's Showroom Gallery, Inc.,*** 2006 WI App 109, 293 Wis.2d 668.

While the SCR 20:1.5(a) factors were not originally propounded to serve as considerations in fee-shifting cases, the Wisconsin Supreme Court has approved their use for this purpose. The factors are: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

Kaskin has the burden to demonstrate that the fees submitted were reasonable. ***Kolupar, supra,*** ¶34. In support of his claim, Kaskin has produced his counsel's billing records, together with affidavits from all of his attorneys and supporting affidavits from other attorneys who do similar work. Lynch relies on the affidavits of its counsel and other attorneys in the Racine area, and also on the affidavit and opinion of Reserve Judge Gordon Myse.

Plaintiff's attorneys' work on this case spans more than three years. After preliminary investigation, the action was filed in January 2007 and, while the matter was settled short of trial, the litigation involved an appeal to the Court of Appeals in addition to the Circuit Court proceedings. Both sides acknowledge that the requested attorney fees are substantial,

particularly when compared with the amount of the stipulated settlement. Defendant says the high fees are a result of inflated hourly rates, unnecessary hours, and duplication of work. Plaintiff says that the work was necessary in light of the defendant's 'scorched earth' approach to this litigation.

Hourly Rate

Kaskin seeks an hourly rate of $285 for Atty. Grzeskowiak, $325 for Atty. Megna, and $450 for Atty. Aiken—the current hourly rates charged by Aiken & Scoptur, S.C. [Approximately 2/3 of the attorney hours requested are those of Atty. Grzeskowiak.] Kaskin argues that because of the delay in payment caused by the length of the litigation, the attorneys' time should be charged at their current (or 2009) hourly rates. Defendant requests that the court employ a blended hourly rate between $250 and $265.

For the first two years of this three-year litigation, Attorneys Grzeskowiak and Megna worked with Jastroch & LaBarge, S.C. Their move to Aiken & Scoptur occurred in January 2009. They state that Kaskin never had a retainer agreement with either that firm or Aiken & Scoptur. However, following a motion to compel by Lynch's attorneys, counsel for plaintiff produced a retainer agreement [entitled "Hourly Contract—Lemon Law Cases"] between Kaskin and Jastroch & LaBarge dated December 22, 2006 that characterized Kaskin's case as "Magnuson Moss claim against GM and dealer." They claim that the hourly rate set forth in that agreement, $265 per hour, is not relevant to the court's determination of a market rate for this Kaskin litigation since the case against Lynch is not a Magnuson Moss claim. They also produced a letter to Mr. Kaskin written in February 2009 after their move to Aiken & Scoptur which advised Kaskin of the hourly rates they now claim as the basis for the lodestar calculation.

The court believes that the December 2006 retainer agreement is relevant, together with the affidavits produced by both sides, in determining the operative hourly rate. The retainer agreement referred to "the firm's current hourly rates" and, while higher than the Racine rates referred to in some of defendant's affidavits, appear to reflect a reasonable market rate for work of the kind involved in this litigation. The court further notes that the agreement provided an attorney fee cap in the event the manufacturer/warrantor "complies with the Lemon Law under the statutory compliance period" or offered satisfactory damages before commencement of suit under the Magnuson-Moss Warranty Act. If those conditions were not met, the agreement provided that the firm would look "exclusively to the manufacturer/warrantor for payment of attorney fees pursuant to the Lemon Law or Magnuson-Moss Act, as applicable." While this lawsuit is not brought under either of those laws, it shares the attribute of being a fee-shifting case.

Counsel disagree with respect to the geographical parameters that should be considered when determining an appropriate hourly rate. The rates set forth in the "Racine" affidavits offered by defendant are lower than those proffered in plaintiff's affidavits. After reviewing the applicable caselaw cited by both parties, and in particular ***Standard Theatres v. Transportation Dept.,*** 118 Wis.2d 730 (1984) and ***Crawford County v. Ben Masel,*** 2000 WI App 172, this court does not believe that Racine County is the only relevant market indicator. In the ***Crawford County*** case, for example, the Wisconsin Supreme Court did not appear to limit the 'market rate' consideration to Crawford County rates, but instead directed that on remand the circuit court consider the affidavits of four other prominent civil rights attorneys who practiced throughout the state, as did Masel's attorney. [The court notes that most of the attorneys referred to in the ***Crawford*** case have their offices in Madison.] Lynch's attorney points the court to the fact that

the Supreme Court in ***Crawford*** used the term "market rate in the community". But the Supreme Court did so in the context of talking about "evidence of market rate in the community that is in the record before us", and that record primarily consisted of the affidavits of non-Crawford County attorneys.

Moreover, the court notes that it is not out of the ordinary to see litigants in Racine County represented by attorneys from Milwaukee such as Mr. Megna and Ms. Grzeskowiak, particularly in cases such as this where the attorneys have and advertise expertise in a certain type of case. Accordingly, the court will consider the supporting attorney affidavits from both sides.

After considering the affidavits of counsel, the supporting attorney affidavits from both plaintiff and defendant, the initial retainer agreement with Jastroch & LaBarge, and the observations of Gordon Myse, the court determines that it is appropriate to use a blended rate for plaintiff's counsel. While all three of plaintiff's attorneys are currently billing at a different rate, all did work on this case and at Megna and Grzeskowiak's former firm there did not appear to be a differentiation in billing rates. As of November 2009, attorney time (exclusive of paralegal time) billed was about 685 hours. Approximately 2/3 of that time was billed by Ms. Grzeskowiak (313 hours at Jastroch & LaBarge and 126 at Aiken & Scoptur.) Of Mr. Megna's 230 billed hours, about ¾ of the hours were billed at Jastroch and LaBarge. Mr. Aiken billed 16 hours.

The court determines that the 'blended' hourly rate should be $275. This is higher than the Jastroch & LaBarge rate and lower than the current Aiken & Scoptur rates, but takes in to account the fact that the litigation spanned several years and two law firms, and was performed by attorneys whose rates are now substantially different from one another. The court observes,

for example, that if the Jastroch and LaBarge time of each attorney were billed at $265 and the Aiken & Scoptur time billed at current rates, Attorney Grzeskowiak's time averages out to $270 per hour and Attorney Megna's at $279. As noted above, about 2/3 of the hours in this case are those of Atty. Grzeskowiak.

Number of Hours Expended

The second prong of the lodestar analysis is the number of hours expended. As of November 2009, plaintiff's counsel had billed about 685 hours of attorney time and 20 hours of paralegal time. In comparison, defendant's attorneys had billed less than half of that—323 hours—though an additional 150 hours were written off because of duplication of work or other reasons. The difference between plaintiff's and defendant's counsel in the actual number of hours recorded is approximately 200. This is somewhat surprising, since plaintiff's counsel makes a strong argument that they specialize in this kind of work (and therefore should presumably be more efficient.) Defendant points out that his attorneys have billed about $52,000, in contrast to plaintiff's requested $209,000.

The number of hours expended by opposing counsel on a case is not necessarily an indication of an appropriate number of hours for the lodestar finding, but as a practical matter is one component that the court can look to. Interestingly, the defendant asks this court to limit the plaintiff's 'reasonable hours' to no more than 235—about 100 fewer hours than were billed by defendant's attorneys and about 250 fewer than were actually expended by defendant's attorneys. He does not explain why a 'reasonable number of hours' for plaintiff's attorneys should be substantially less than the number his attorneys billed.

The court begins the analysis with the number of hours actually billed by plaintiff's attorneys—685, with 20 additional hours of paralegal time. While a supplemental affidavit sets forth the time expended between November 2009 and January 2010, most of that time was spent responding to defendant's motion to compel discovery of the fee agreement—which the court believes should have been produced without the necessity for a motion. The court will not award fees for that time.

The court notes, as did Judge Myse, that a very substantial amount of time was spent on the appellate briefing of an issue that had already been substantially briefed in the circuit court. The briefing was done by both Attorneys Grzeskowiak and Megna and there does appear to be some duplication of effort. Defendant also points to examples of both attorneys billing for conferences and client meetings on the same day [the examples amount to less than 30 hours, though there do appear to be other instances of duplication.] The court does not doubt that both attorneys performed the work and were present as the billing statements indicate, but does believe that some duplication should be stricken in a calculation of 'reasonable hours.'

This is a case that, from the billing statements, appears to have been very aggressively pursued by the plaintiff. While there may have been some 'overtrial' in this case that never actually went to trial, some of that can be attributed to the defendant's equally aggressive stance.

Upon a review of all of the billings in this case, and after considering the arguments of the parties, the court determines the 'reasonable number of hours expended' to be 550. In making this determination, the court considers that a substantial hourly rate has already been established—one that, at the request of plaintiff's counsel, took in to account the specialization and skill of the attorneys. The court also considers the amount of time spent by defense counsel,

but recognizes that it would not be unusual for plaintiff's attorneys to expend more time developing this case than defense attorneys.

The lodestar award, then, is calculated at 550 hours multiplied by $275, for a total of $151,250.

SCR Factors

The court then looks to the applicable SCR factors to determine whether the lodestar should be adjusted up or down. To some extent, the court has already considered these factors in a determination of the appropriate hourly rate and reasonable hours.

1) *The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.* This case ultimately involved a new issue for the court of appeals. It is not an overly technical area of the law, but one in which there is still room for novel legal issues. While the underlying monetary amounts were not great, this case involved substantial argument at the circuit court level, a motion for reconsideration, a trip to the court of appeals, and preparation for a trial that was settled shortly before the trial date itself. These factors are adequately addressed in the lodestar calculation and do not merit either an upward or downward adjustment.
2) *The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.* This factor has little bearing on this case.
3) *The fee customarily charged in the locality for similar legal services.* This factor is substantially discussed in the court's decision above.

4) *The amount involved and the results obtained.* This factor is troubling, as the amount at issue for the plaintiff pales beside the attorney fees expended by both sides. Judge Myse's analysis in particular sharply points this out. Ultimately, plaintiff prevailed, and the matter was settled for $12,500. At the outset of this litigation, neither party could have imagined the significant number of hours this relatively small case would require. Yet if attorney fees were limited to only a consideration of the amount at issue, few lawyers would accept this type of case. That, indeed, is largely the idea behind the 'private attorney general' theory that grants double damages and attorney fees in these cases. Though the amount at issue was small, the court does not believe that that should serve to slash the attorney fees for lawyers in a case where both sides expended enormous time and effort.

5) *The time limitations imposed by the client or by the circumstances.* This factor does not appear applicable.

6) *The Nature and Length of the Professional Relationship with the Client.* This factor does not appear applicable to either raise or lower the lodestar amount in this case.

7) *The experience, reputation, and ability of the lawyer or lawyers performing the services.* This factor was taken in to account in setting the hourly rate determined by the court.

8) *Whether the fee is fixed or contingent.* This factor was also considered above by the court in setting the hourly rate and noting that plaintiff's counsel had agreed to look to the defendant for payment of attorney fees in the event of anything other than a very early settlement.

In short, the court does not believe that the SCR factors should raise or lower the lodestar amount in this case. This is in part because the SCR factors inevitably played a part in the lodestar analysis itself.

Accordingly, the court determines that defendant should pay reasonable attorney fees in the amount of $151,250.00 together with the undisputed costs of $5,283.51.00.

Counsel for plaintiffs is directed to prepare the judgment.

Dated April 15, 2010

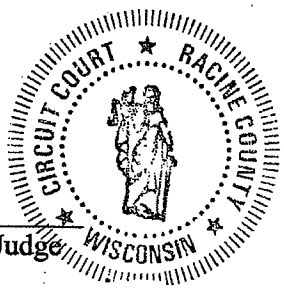
FILED

APR 16 2010

CLERK OF CIRCUIT COURTS
RACINE COUNTY

BY THE COURT:

Emily S. Mueller, Circuit Judge



C

Court of Appeals of Wisconsin.
Randy W. KASKIN, Plaintiff-Appellant,
v.
JOHN LYNCH CHEVROLET-PONTIAC SALES, INC., a Wisconsin corporation, Defendant-Respondent.

No. 2008AP1199.
Submitted on Briefs March 5, 2009.
Opinion Filed April 29, 2009.

Background: After paying a bill for a repair he had assumed was under warranty, truck owner filed action against repair shop, claiming violation of section of consumer protection law dealing with unauthorized motor vehicle repair. The Circuit Court, Racine County, Richard J. Kreul, J., granted repair shop's motion for summary judgment on the basis that truck owner did not suffer a pecuniary loss. Truck owner appealed.

Holdings: The Court of Appeals, Brown, C.J., held that:
(1) owner's pecuniary loss was the entire amount of the unauthorized charges that he paid to repair shop, and
(2) under no legal theory can a motor vehicle repair shop collect for unauthorized repairs.

Reversed and remanded.

West Headnotes

[1] Antitrust and Trade Regulation 29T ⚖ 195

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regulations
29Tk191 Motor Vehicles
29Tk195 k. Service and Repair. Most Cited Cases

"Pecuniary loss because of a violation," as used in statute providing a private remedy to consumers for violation of rules prohibiting a repair shop from demanding or receiving payment for unauthorized motor vehicle repairs and refusing to return the customer's vehicle if the customer declines to pay for unauthorized repairs, means the amount the consumer paid for unauthorized motor vehicle repairs. W.S.A. 100.20(5); Wis.Admin. Code §§ ATCP 132.093(3)(a), 132.093(4)(e).

[2] Antitrust and Trade Regulation 29T ⚖ 195

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regulations
29Tk191 Motor Vehicles
29Tk195 k. Service and Repair. Most Cited Cases

By requiring motor vehicle repair shops to receive permission from the consumer to perform repairs at a certain price, the administrative code ensures that consumers have the power to choose whether to have the repair work performed, in the manner and price suggested by the repair shop, or seek other options; in other words, the code promulgates a concept of informed consent for the consumer. Wis.Admin. Code § ATCP 132.01 et seq.

[3] Antitrust and Trade Regulation 29T ⚖ 195

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regulations
29Tk191 Motor Vehicles
29Tk195 k. Service and Repair. Most Cited Cases

Where a general order promulgated by Department of Agriculture, Trade and Consumer Protec-

tion, under statute authorizing Department to issue orders forbidding methods of competition in business or trade practices in business which are determined by the department to be unfair, prohibits the retention or receipt of the customer's money, the consumer suffers a pecuniary loss, under statute providing a private remedy to consumers for violation of such orders, in the amount that was wrongfully retained or received. W.S.A. 100.20(2, 5).

[4] Antitrust and Trade Regulation 29T ⇐195

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regulations
29Tk191 Motor Vehicles
29Tk195 k. Service and Repair. Most Cited Cases

When a motor vehicle repair shop receives money from a customer for repairs that the customer did not authorize, or at a price not authorized, the customer's pecuniary loss, under statute providing a private remedy to such customer, is the entire amount of the unauthorized charges that the customer paid to the motor vehicle repair shop. W.S.A. 100.20(5); Wis.Admin. Code § ATCP 132.01 et seq.

[5] Antitrust and Trade Regulation 29T ⇐195

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regulations
29Tk191 Motor Vehicles
29Tk195 k. Service and Repair. Most Cited Cases

A motor vehicle repair shop customer filing an action under statute providing private remedy for violation of part of consumer protection law dealing with unauthorized motor vehicle repair is not required to prove anything except that (1) he paid and (2) that payment was for unauthorized repairs or repairs otherwise performed in violation of that part of consumer protection law. W.S.A. 100.20(5); Wis.Admin. Code § ATCP 132.01 et seq.

[6] Antitrust and Trade Regulation 29T ⇐195

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regulations
29Tk191 Motor Vehicles
29Tk195 k. Service and Repair. Most Cited Cases

A motor vehicle repair shop customer finding a violation of the written estimate requirement has not suffered a pecuniary loss, under statute providing private remedy for such violation, if the customer admits to authorizing to the repairs. W.S.A. 100.20(5); Wis.Admin. Code § ATCP 132.01 et seq.

[7] Antitrust and Trade Regulation 29T ⇐195

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regulations
29Tk191 Motor Vehicles
29Tk195 k. Service and Repair. Most Cited Cases

Under no legal theory can a motor vehicle repair shop collect for unauthorized repairs. Wis.Admin. Code § ATCP 132.01 et seq.

****395** On behalf of the plaintiff-appellant, the cause was submitted on the briefs of Vincent P. Megna and Susan M. Grzeskowiak of Jastroch & Labarge, S.C. of Waukesha.

On behalf of the defendant-respondent, the cause was submitted on the brief of ****396** Jeffrey Leavell and Anissa M. Boeckman of Jeffrey Leavell, S.C. of Racine.

A nonparty brief was filed by Paul R. Norman and

M. Tess O'Brien-Heinzen of Boardman, Suhr, Curry & Field, LLP for Wisconsin Automobile & Truck Dealers Association

A nonparty brief was filed by John S. Green, Assistant Attorney General, and J.B. Van Hollen, Attorney General, for the Wisconsin Department of Justice.

A nonparty brief was filed by Sarah J. Orr for the University of Wisconsin Law School Consumer Litigation Clinic.

Before BROWN, C.J., ANDERSON, P.J., and SNYDER, J.

¶ 1 BROWN, C.J.

***805** This case concerns that part of our consumer protection law dealing with unauthorized motor vehicle repair. WISCONSIN ADMIN. CODE § ATCP 132.09(1), (4)(e) (Oct.2004) [FN1] states, in pertinent part, that " [n]o shop may ... [d]emand or receive payment for unauthorized repairs, or for repairs that have not been performed." We hold that a major purpose of this provision is to prevent either unexpected repairs, unexpected expense or both. Therefore, if the work done here was unauthorized, then the harm to the consumer, Randy W. Kaskin, was that he was deprived of his prescribed right to be informed and his concomitant right to consent or refuse consent. The remedy for a ***806** violation of this right is that the repair shop must forego being paid, even if the shop did, in fact, satisfactorily repair the vehicle.

FN1. All references to the WIS. ADMIN. CODE ch. ATCP 132 are to the October 2004 version unless otherwise noted.

¶ 2 In so holding, we reject the theory of the repair shop, Lynch Chevrolet in this case, that "pecuniary loss" as the term appears in WIS. STAT. § 100.20(5) (2007-08) [FN2] means the amount the consumer can prove he or she paid, either to the repair shop or to another repair shop, to correct a bad repair job done by the shop being complained against. That circumstance has nothing to do with unexpected repair or expense and everything to do with faulty repair-which is not the mischief the rule was designed to prevent. Consumers do not need § 100.20(5) to bring a cause of action for a bad repair job. They can avail themselves of common law remedies for faulty repair. And we also reject Lynch's alternative theory that the measure of "pecuniary loss" is the difference between the amount the motor vehicle owner was forced to pay to get the car back and the lesser amount the owner can prove would have been paid had the owner been so informed and gone somewhere else to get the repair done. Because the circuit court adopted Lynch's primary position at summary judgment, and in so doing, held that the disputed fact about authorization was immaterial, and because the issue of authorization otherwise remains disputed, we reverse and remand with directions that the authorization issue be tried.

FN2. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶ 3 In August 2006, Kaskin bought a brand new 2007 Chevrolet Silverado truck. That November, after about 3300 miles, the engine started knocking. Eventually, Kaskin had his truck towed to Lynch and explained***807** via telephone to an assistant service manager that something was wrong with his truck. The next day, Kaskin spoke in person with the assistant service manager at Lynch, who gave him a repair order that provided a preliminary estimate ****397** of one penny because Lynch assumed the truck was under warranty.

¶ 4 Kaskin claims that Lynch did not request any authorization from him to diagnose or inspect the vehicle. He further claims that, to the extent he authorized any investigation or repairs, it was only with the understanding that whatever needed to be fixed was under warranty. However, Lynch claims that Kaskin not only requested investigation and nonwarranty repair, he demanded it and authorized

it. Here is the disputed fact that the trial court will have to address on remand.

¶ 5 About a week after dropping his truck off, Kaskin got a call from Lynch that his truck was done. Kaskin got some good news from Lynch: they fixed his truck. The truck had bad fuel in the fuel tank and the fuel had ruined the engine injectors. Lynch replaced all eight injectors and the truck now ran smoothly. Kaskin also got some bad news: he now owed Lynch almost $5000. Kaskin protested because he thought it was a warranty repair. But Lynch would not give Kaskin his truck back until he paid the bill, so Kaskin paid.

¶ 6 Outraged that he had to pay a bill for a repair that he had assumed was under warranty, Kaskin filed an action under WIS. STAT. § 100.20 (5) claiming that since he never authorized any nonwarranty repairs, Lynch violated WIS. ADMIN. CODE ch. ATCP 132. Lynch moved for summary judgment and the circuit court denied the motion because the parties disputed a material fact: whether Kaskin had authorized the repairs at his expense. On reconsideration, Lynch asserted that ***808** authorization was immaterial, contending that Kaskin did not suffer a pecuniary loss because of Lynch's alleged violation. Lynch explained to the circuit court that it did not cause Kaskin's truck to need engine repair and Kaskin paid a fair price for a proper repair that fixed his truck. The circuit court agreed, holding that the engine problems were caused by bad fuel and not Lynch's alleged failure to obtain Kaskin's authorization. Therefore, the circuit court concluded that the authorization issue was immaterial because Kaskin did not suffer a pecuniary loss, or at least not a pecuniary loss caused by the lack of authorization.

¶ 7 On appeal, Kaskin asserts that the circuit court erred in its interpretation of pecuniary loss in WIS. STAT. § 100.20(5). He argues that the term "pecuniary loss," as it appears in the statute, means the amount a customer has to pay a repair shop for unauthorized motor vehicle repairs performed in violation of WIS. ADMIN. CODE ch. ATCP 132. Therefore, Kaskin contends, his pecuniary loss was the almost $5000 he paid to Lynch.

¶ 8 We review the circuit court's decision to grant summary judgment de novo. *Snyder v. Badgerland Mobile Homes, Inc.*, 2003 WI App 49, ¶ 7, 260 Wis.2d 770, 659 N.W.2d 887. The standard of review for summary judgment is well known and we will not repeat it here except to say that summary judgment is reserved for cases where the issue to be resolved is a pure question of law and is not appropriate when there is a genuine issue of material fact. *Id.*, ¶ 8.

[1] ¶ 9 Kaskin's appeal requires us to interpret the meaning of "pecuniary loss because of a violation" as used in WIS. STAT. § 100.20(5). Section 100.20(5) states:

> **(5)** Any person suffering pecuniary loss because of a violation by any other person of any order issued under ***809** this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee.

****398** This language provides a private remedy for consumers who fall victim to the unfair methods of competition and trade practices prohibited by, inter alia, general orders of the Department of Agriculture, Trade and Consumer Protection promulgated under § 100.20(2). In other words, § 100.20 (5) "supplies the teeth" to the DATCP orders. *Benkoski v. Flood*, 2001 WI App 84, ¶ 16, 242 Wis.2d 652, 626 N.W.2d 851.

¶ 10 The forbidden trade practice at issue in this case is found in WIS. ADMIN. CODE ch. ATCP 132. Chapter ATCP 132 is entitled motor vehicle repairs and its sections explain the information motor vehicle repair shops must provide to customers and the customer authorization shops must obtain before beginning repairs. *See* §§ ATCP 132.02, 132.03. Of particular importance to the case at bar, § ATCP 132.02 says that "[n]o shop may

perform any repair that has not been authorized by the customer." It further informs that a shop representative must record the repair authorization on a written repair order as provided by another section of the code. Section ATCP 132.04 outlines the price information that must be given to the customer. We quote this provision in full in a footnote. FN3 Suffice it to say, the requirements are clear-cut and stringent.

FN3. WISCONSIN ADMIN. CODE § ATCP 132.04 states as follows:

ATCP 132.04 Repair price information. (1) Estimate alternatives or firm price quotation; shop's choice. Before a shop starts any repairs whose total price may exceed $50, a shop representative shall provide the customer with a written statement of estimate alternatives under sub. (2) or a firm price quotation under sub. (3). This requirement does not apply if there has been no face-to-face contact between the customer and a shop representative.

(2) STATEMENT OF ESTIMATE ALTERNATIVES. (a) A statement of estimate alternatives, if provided, shall be conspicuously printed in the following form, either on the repair order or on a separate document attached to the repair order:

"YOU ARE ENTITLED TO A PRICE ESTIMATE FOR THE REPAIRS YOU HAVE AUTHORIZED. THE REPAIR PRICE MAY BE LESS THAN THE ESTIMATE, BUT WILL NOT EXCEED THE ESTIMATE WITHOUT YOUR PERMISSION. YOUR SIGNATURE WILL INDICATE YOUR ESTIMATE SELECTION.

1. I request an estimate in writing before you begin repairs.

_____

2. Please proceed with repairs, but call me before continuing if the price will exceed $ _____.

_____

3. I do not want an estimate.

_____"

(b) If the statement of estimate alternatives under par. (a) is printed on a separate document, rather than on the repair order, the separate document shall include the repair order number or other information which uniquely identifies the authorization with the repair order. The shop shall keep a copy of the signed authorization with its records.

(3) FIRM PRICE QUOTATION. (a) A firm price quotation, if provided, shall be written on the repair order and shall be accompanied by the following conspicuous statement on the repair order: **"THIS PRICE FOR THE AUTHORIZED REPAIRS WILL NOT BE EXCEEDED IF THE MOTOR VEHICLE IS DELIVERED TO THE SHOP WITHIN 5 DAYS."**

(b) A shop may not exceed the firm price quoted under par. (a) for the specified repairs to the vehicle, component, part or accessory, if the customer delivers that motor vehicle, component, part or accessory to the shop within 5 days after the date on which the firm price is quoted.

(c) Notwithstanding sub. (4), a shop is not required to give a customer an estimate for repairs if the shop gives the cus-

tomer a firm price quotation under par. (a) for those repairs.

(4) ESTIMATE REQUIRED. If any of the following has occurred, a shop representative shall give the customer an oral or written estimate, and shall write that estimate on the repair order before the shop starts any repairs whose total price may exceed $50:

(a) The customer has signed estimate alternative 1 under sub. (2).

(b) There has been face-to-face contact between the customer and a shop representative, but the customer has not signed any of the estimate alternatives under sub. (2).

(c) The shop has accepted any prepayment from the customer.

(d) The customer has requested an estimate before authorizing a repair under s. ATCP 132.02.

****399 *810** ¶ 11 Also relevant is that shops are prohibited from demanding or receiving payment for unauthorized ***811** repairs and refusing to return the customer's vehicle if the customer declines to pay for unauthorized repairs. WIS. ADMIN. CODE § ATCP 132.09(3)(a), (4)(e). For the purpose of determining the meaning of "pecuniary loss because of a violation," we will assume that Lynch required Kaskin to pay for unauthorized repairs before it returned his vehicle, therefore violating ch. ATCP 132.

¶ 12 The construction of statutes and administrative rules and regulations are both questions of law we decide without deference to the circuit court's conclusions. *Moonlight v. Boyce,* 125 Wis.2d 298, 303, 372 N.W.2d 479 (Ct.App.1985). The construction of administrative rules is governed by the same principles that apply to statutes. *Huff & Morse, Inc. v. Riordon,* 118 Wis.2d 1, 4, 345 N.W.2d 504 (Ct.App.1984), *holding limited on other grounds by Baierl v. McTaggart,* 2001 WI 107, ¶¶ 16-17, 19, 245 Wis.2d 632, 629 N.W.2d 277. When construing statutes, we aim to discern the legislative***812** intent of the statute. *Moonlight,* 125 Wis.2d at 303, 372 N.W.2d 479. In determining the intent, we look first to the plain language of the statute. *Snyder,* 260 Wis.2d 770, ¶ 10, 659 N.W.2d 887. If the language is unambiguous we must end our inquiry and give it effect. *Id.* Otherwise, we ascertain the legislative intent by examining the language of the statute and extrinsic evidence to determine the scope, history, context, subject matter and purpose of the statute. *See, e.g., Hughes v. Chrysler Motors Corp.,* 197 Wis.2d 973, 979, 542 N.W.2d 148 (1996).

¶ 13 Lynch theorizes that, with respect to WIS. STAT. § 100.20(5), the term " 'because of a violation' clearly indicates that there must be causation between Lynch's actions that violate the code and any pecuniary loss suffered by Mr. Kaskin." It contends that the language of § 100.20(5) plainly requires the injured party to prove that the shop caused the need for the repairs, or that the repairs were somehow unnecessary or billed at an excessive rate.

¶ 14 We have no quarrel with the assertion that a violation of the code must "cause" a pecuniary loss to the consumer. In fact, that is exactly what the statute and the code mean to say. The quarrel instead is: how is "pecuniary loss" measured? Both WIS. STAT. § 100.20 and WIS. ADMIN. CODE ch. ATCP 132 are silent as to whether pecuniary loss means the amount the consumer paid for unauthorized motor vehicle repairs. There is also no case in Wisconsin that has analyzed this issue. But, looking at the clear and, in our view, unambiguous language of both the statute and the code, it is apparent to us that the pecuniary loss is precisely the amount the consumer paid for unauthorized repairs. Section 100.20(5) says that "[a]ny person suffering pecuniary loss *because of a violation* " is entitled to ***813** damages pursuant to the statute. (Emphasis

added.) And the preamble note to ch. ATCP 132 states, in pertinent part:

> This chapter is adopted under authority of s. 100.20(2) Stats., and is administered by the Wisconsin department of agriculture, trade and consumer protection. *Violations of this chapter may be prosecuted under s. 100.20* ... A person who suffers a monetary loss *because of a violation of this chapter* may sue the violator directly.... (Emphasis added.)

¶ 15 It is our view that the preposition "because of" modifies the verb "suffering" ****400** as it appears in the statute and "suffers" as is found in the code. Thus, a consumer "suffers" or is "suffering" because of a violation of the chapter. And since the chapter prohibits unauthorized repairs, it follows that unauthorized repairs make the consumer "suffer." Therefore, using the common understanding of the term "because of," we think that the "monetary" or "pecuniary loss" is clearly the amount suffered to be paid as a result of the violation of the code. There is nothing, either in the statute or the code, which says that the consumer must prove something different. We are constrained from adding words to a statute that are not there. *Fond Du Lac County v. Town of Rosendale,* 149 Wis.2d 326, 334, 440 N.W.2d 818 (Ct.App.1989).

[2] ¶ 16 The case law that we have collected on this subject supports our interpretation of the statute. In *Huff & Morse,* 118 Wis.2d at 9, 345 N.W.2d 504, we recognized that a major purpose of WIS. ADMIN.CODE ch. ATCP 132 is to prevent repair shops from performing *uncommissioned,* or *unauthorized,* repairs. In that case, we explained that "[s]hops which obtain consent to proceed on specific***814** repair work have been commissioned to do so. The code was promulgated to prevent shops from proceeding with repairs unless they have received permission to do so." *Huff & Morse,* 118 Wis.2d at 9, 345 N.W.2d 504. Unsaid, but underpinning our statement was the understanding that by requiring shops to receive permission from the consumer to perform repairs at a certain price, the code was ensuring that consumers have the power to choose whether to have the repair work performed, in the manner and price suggested by the repair shop, or seek other options. In other words, the code promulgated a concept of "informed consent" for the consumer. *See Morris v. Gregory,* 339 Md. 191, 661 A.2d 712, 716 n. 4 (1995) (the purpose of the Maryland consumer protection statute relating to vehicle repair is to inform individuals).

¶ 17 The "informed consent" concept is an integral part of consumer protection law, not only here, but across the nation. Many states have adopted stringent rules regarding motor vehicle repair. *See* Jay M. Zitter, Annotation, *Automobile Repairman's Duty to Provide Customer with Information, Estimates, or Replaced Parts, Under Automobile Repair Consumer Protection Act,* 25 A.L.R.4th 506 (2008). These states have crafted statutes or rules requiring disclosures by automotive repairers before work is begun, just as this state does. Why? Washington State's automobile repair law provides an answer. Its code "is a consumer protection statute designed to foster fair dealing and to eliminate misunderstandings in a trade replete with frequent instances of unscrupulous conduct." *Bill McCurley Chevrolet, Inc. v. Rutz,* 61 Wash.App. 53, 808 P.2d 1167, 1169 (1991).

¶ 18 That same understanding was evident in *Huff & Morse.* Although we did not decide whether pecuniary loss is the amount the customer paid for the unauthorized repairs, it is self-evident that we understood***815** how the disclosure provisions were designed to address problems of unexpected repairs and unexpected charges for repairs. In *Huff & Morse,* the customer did not pay the repair bill or file an action under WIS. STAT. § 100.20(5). *Huff & Morse,* 118 Wis.2d at 12, 345 N.W.2d 504. Instead, the motor vehicle repair shop sued to compel payment and the customer's defense was that the repair shop did not follow the exact form of consent provided by the code. *Id.* at 5, 8, 345 N.W.2d 504. So, we examined whether the shop could use quantum meruit to compel payment for the repairs

even though the shop received oral instead of written authorization,**401 thereby violating WIS. ADMIN. CODE ch. ATCP 132. *Huff & Morse,* 118 Wis.2d at 10, 345 N.W.2d 504. We held that the shop could recover only the reasonable value of services provided, and only up to the original amount authorized. *Id.* We wrote that, "[t]o allow recovery for an amount in excess of the authorization would be to allow recovery for unauthorized repairs. In situations where the repairs are not authorized, collection under any legal theory is prohibited.... [T]here can be no recovery for unauthorized repairs." *Id.* at 10-11, 345 N.W.2d 504. The meaning of this passage was clear then and is clear now. The purpose of the code is to prevent unauthorized repairs. If the repairs are unauthorized, they violate the code. If they violate the code, the repair shop has no legal ground upon which to base a claim.

¶ 19 *Benkoski* further informs. There we explained that courts should liberally construe remedial statutes, such as WIS. STAT. § 100.20(5), to suppress the mischief and advance the remedy that the statute intended to afford.[FN4] *Benkoski,* 242 Wis.2d 652, ¶¶ 8, 16, 626 N.W.2d 851. The mischief, as we have said, is repair work done *816 without consent of the consumer or at a cost exceeding the repair price information given to the consumer. Therefore, the decision by the circuit court in this case, that the consumer should only be able to get his or her money back if the repairs were no good, ignores two of the basic purposes of the code-combating the mischief of doing work that was unexpected or charging in a manner that was unexpected.

> FN4. The Consumer Law Litigation Clinic, in its amicus curiae brief, provided an example of the mischief the legislature sought to suppress and the importance of the "private attorney general" remedy in WIS. STAT. § 100.20(5):
>
> [T]he [Consumer Law Litigation Clinic] represented a couple who took their only car to a local repair shop to be fixed. The family was, in the truest sense, one unexpected expense away from financial disaster. The shop performed repair after repair, without pre-authorization or written estimates, until the couple could no longer afford to pay. The shop refused to release the car, despite the couple's payment of hundreds of dollars above the initial "estimate." Without transportation, the husband lost his job, leaving the family on the brink of homelessness. [Under WIS. STAT. § 100.20(5),] [t]hat couple was able to sue for damages, attorney's fees and costs-an impossibility without the mantle of the "private attorney general."

¶ 20 In *Moonlight,* 125 Wis.2d at 304-05, 372 N.W.2d 479, we examined the meaning of pecuniary loss under WIS. STAT. § 100.20(5) for a violation of WIS. ADMIN. CODE ch. ATCP 134 (unfair residential rental practices). The court held that the landlord violated ch. ATCP 134 by not following the prescribed methods of withholding a tenant's security deposit. *Moonlight,* 125 Wis.2d at 304, 372 N.W.2d 479. The landlord contended that, even if he violated ch. ATCP 134, the tenant did not suffer a pecuniary loss because the tenant had damaged the apartment and his judgment against the tenant for damages exceeded the amount of the security deposit. *Moonlight,* 125 Wis.2d at 302-03, 372 N.W.2d 479.

¶ 21 If we followed Lynch's logic, which is similar to the landlord's logic in *Moonlight,* the tenant would *817 not have suffered a pecuniary loss because the tenant lost his security deposit due to damage he did to the apartment. No damage was caused by the landlord wrongfully withholding the tenant's security deposit. Therefore, under Lynch's theory, the tenant's only pecuniary loss would be the amount attributable to improper repairs or repairs for which the landlord overcharged.

¶ 22 The court in *Moonlight,* however, con-

cluded that the opposite was true. It held that once an administrative code violation**402 was found, the tenant suffers a pecuniary loss under WIS. STAT. § 100.20(5) in the amount of the security deposit, regardless of the amount of damages the landlord may recover on a counterclaim. *Moonlight,* 125 Wis.2d at 305-06, 372 N.W.2d 479. In fact, the court also held that the tenant's pecuniary loss had to be doubled before the court would offset the tenant's damage award with the landlord's judgment. *Id.* at 306, 372 N.W.2d 479.

¶ 23 A similarly broad interpretation of pecuniary loss was repeated in *Hughes* and *Pliss v. Peppertree Resort Villas, Inc.*, 2003 WI App 102, 264 Wis.2d 735, 663 N.W.2d 851.[FN5] In calculating the pecuniary loss under lemon law, the court in *Hughes* concluded that pecuniary loss included the entire purchase price that the business wrongfully retained. *Hughes,* 197 Wis.2d at 982-83, 542 N.W.2d 148. In so doing, the court rejected the business's argument that the pecuniary loss should be limited to the customer's out-of-pocket expenses. *Id.* at 979, 542 N.W.2d 148. The court in *Pliss* applied a broad interpretation in a situation where the business *received* the customer's *818 money, instead of retained it. In *Pliss,* the court explained that "the pecuniary loss is ... the money paid for the product that the consumer was improperly induced into buying." *Pliss,* 264 Wis.2d 735, ¶ 21, 663 N.W.2d 851.

FN5. In *Pliss v. Peppertree Resort Villas, Inc.*, 2003 WI App 102, ¶ 5, 264 Wis.2d 735, 663 N.W.2d 851, a customer sued a timeshare resort under WIS. STAT. § 100.20(5) for a violation of WIS. ADMIN. CODE ch. ATCP 121 (1968).

[3][4][5][6] ¶ 24 We take away from *Moonlight , Hughes* and *Pliss* the following rule: where a general order promulgated by DATCP under WIS. STAT. § 100.20(2) prohibits the retention or receipt of the customer's money, the consumer suffers a pecuniary loss under § 100.20(5) in the amount that was wrongfully retained or received. As applied here, this rule supports our construction of the statute and the code-that when a motor vehicle repair shop receives money from a customer for repairs that the customer did not authorize, or at a price not authorized, the customer's pecuniary loss is the entire amount of the unauthorized charges that the customer paid to the motor vehicle repair shop. A customer filing an action under § 100.20(5) is therefore not required to prove anything except that (1) he or she paid and (2) that payment was for unauthorized repairs or repairs otherwise performed in violation of WIS. ADMIN. CODE ch. ATCP 132.[FN6]

FN6. We acknowledge that not every violation of WIS. ADMIN. CODE ch. ATCP 132 amounts to the repairs being unauthorized by the customer. *See, e.g., Huff & Morse, Inc. v. Riordon,* 118 Wis.2d 1, 10, 345 N.W.2d 504 (Ct.App.1984). In *Huff & Morse,* we explained that WIS. STAT. § 100.20(5) does not prohibit a motor vehicle repair shop from collecting or receiving payment for repairs that have not been authorized by the exact requirements of the code. *Huff & Morse,* 118 Wis.2d at 10, 345 N.W.2d 504. Instead, a customer finding a violation of the written estimate requirement has not suffered a pecuniary loss if the customer admits to authorizing to the repairs. *See id.* at 9, 345 N.W.2d 504. However, if the customer does not admit to authorizing the repairs and the trial court finds that the customer did not authorize the repairs as a matter of fact, then the shop *may never collect for the unauthorized repairs under any legal theory.* The lack of customer authorization is never a technical violation.

819 ¶ 25 Following Lynch's theory would also be contrary to the legislative intent of both WIS. STAT. § 100.20(5) and WIS. ADMIN. CODE ch. ATCP 132. Limiting pecuniary loss to the amount by which the repair shop caused the need for the re-

pairs, or charged at above market rates, for unnecessary repairs, or for "phantom" repairs that never occurred, would emasculate the law to such an extent that consumers**403 would essentially be back to the status quo before the legislature enacted § 100.20(5). Instead of encouraging consumers to enforce their rights and deterring prohibited conduct through liberal private remedies, the law would leave many consumers with minimal damage awards. This would defeat the manifest object of the code by allowing repair shops to perform unauthorized repairs without the severe penalty of nonpayment. *See Baierl,* 245 Wis.2d 632, ¶ 21, 629 N.W.2d 277 (DATCP's orders under § 100.20(2) are to be construed in a manner which reflects the intent of the regulation over one that defeats its manifest object). As we stated in *Huff & Morse,* under no legal theory can a repair shop collect for *unauthorized* repairs. *Huff & Morse,* 118 Wis.2d at 11, 345 N.W.2d 504.

¶ 26 The repair shop and amicus curiae, Wisconsin Auto and Truck Dealers Association, believe this construction to be unfair, especially if, as they claim is undisputed in this case, the repairs made actually fixed the vehicle in a satisfactory manner such that the consumer received a valuable benefit. We understand that and commiserate with the repair shop and amicus curiae to the extent that the repair shop acted in good *820 faith in not engaging in excessive and unnecessary repair. But to paraphrase an oft-repeated and now trite expression, the law is what the law is. If the association feels that the statutory damage provision is out of proportion to the harm done by the lack of authorized consent, its recourse is through the legislature, not the courts. *See Estate of Furgason v. Wisconsin DHSS,* 211 Wis.2d 732, 740, 566 N.W.2d 169 (Ct.App.1997) (the authority to determine policy rests with the legislature, not the courts, and courts cannot rewrite statutes to meet a party's desired construction).

¶ 27 And frankly, our view is that the requirement of a written repair estimate with an estimated price is a simple procedure that does not impose a great economic burden on repair shops. This is important because the policy makers in this instance obviously weighed that insignificant cost to the marketplace against the need to curtail the persistent practices of exploitive merchants bent on targeting the unknowledgeable motor vehicle owner. The policy makers no doubt intended to protect consumers against misunderstandings arising from less-than-clear estimates and the legal disputes and litigation that result from the fait accompli nature of claims for repair work already done. *See Osteen v. Morris,* 481 So.2d 1287, 1290 (Fla.Dist.Ct.App.1986).

¶ 28 We hold that a repair shop, which finds itself outside the law and which has taken money from a consumer after violating the law, causes pecuniary loss to the consumer because of the violation. This is so because the consumer has been prevented from exercising a statutory right-the right of informed consent. It is not the consumer's burden to prove that he or she would have done something differently had the proper information been given. Rather, the burden is wholly *821 upon the repair shop. Strict as it is, the policy makers obviously believed that only by exposing the repair shop industry to strict conformance at the risk of having to pay back double if sued, could the problem of consumer exploitation be resolved. *See Benkoski,* 242 Wis.2d 652, ¶ 17, 626 N.W.2d 851. Because of our holding, whether Kaskin can ultimately prevail depends on whether he authorized the repairs. Therefore, we remand this case with directions to resolve this issue of fact.

Judgment reversed and cause remanded with directions.

Wis.App.,2009.
Kaskin v. John Lynch Chevrolet-Pontiac Sales, Inc.
318 Wis.2d 802, 767 N.W.2d 394, 2009 WI App 65

END OF DOCUMENT

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
No. 2008AP1199

RANDY W. KASKIN,

Plaintiff-Appellant,

v.

JOHN LYNCH CHEVROLET-PONTIAC SALES INC.,

Defendant-Respondent,

On Appeal From
Circuit Court for Racine County
The Honorable Richard J. Kreul Presiding

STATE OF WISCONSIN'S AMICUS CURIAE BRIEF

J.B. VAN HOLLEN
Attorney General
JOHN S. GREENE
Assistant Attorney General
State Bar No. 1002897

Attorneys for *Amicus Curiae* State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3936

TABLE OF CONTENTS

The decision on this appeal could seriously affect the ability of both the state and individual consumers to enforce the state's consumer protection laws and deter unlawful business conduct. For this reason, the Department of Agriculture, Trade and Consumer Protection has requested the filing of this brief to provide the state's perspective on the decision under review, and its implications for the consumer protection enforcement regime established by the Legislature.

I. RECOVERY OF PECUNIARY LOSSES BY CONSUMERS UNDER WIS. STAT. §100.20(5) IS A CRITICAL COMPONENT OF WISCONSIN'S CONSUMER PROTECTION LAWS.

The statutory centerpiece of Wisconsin's consumer protection system is Wis. Stat. §100.20, which provides as follows:

> Unfair methods of competition in business and unfair trade practices in business are hereby prohibited.

Wis. Stat. §100.20(1).

To effectuate this general prohibition, the Legislature acted on two fronts. First, it

empowered DATCP to promulgate rules identifying and forbidding specific unfair business practices.[1] Wis. Stat. §100.20(2)(a). DATCP has exercised this authority in promulgating a number of administrative rules, including the one at issue here—ATCP chapter 132—which regulates motor vehicle repair. Among other areas addressed by DATCP rules are residential rental practices (chapter 134), direct marketing (chapter 127), home improvement practices (chapter 110), telecommunications services (chapter 123), and mobile home parks (chapter 125).

Second, the Legislature created both private and public remedies to enforce violations of § 100.20, although initially private suits were the

[1] It also authorized DATCP to issue special orders directed at specific businesses or persons. Wis. Stat. § 100.20(3).

primary means of enforcement. When it enacted the predecessor to § 100.20, the Legislature included virtually the same double damages and attorney's fee remedy as exists today in § 100.20(5). 1921 Wis. Sess. Laws, ch. 571, sec. 2.

It was not until 1970 that the Legislature provided the Attorney General with meaningful enforcement tools, such as injunctive relief, forfeitures, and restitution for injured consumers.[2] 1969 Wis. Sess. Laws, ch. 425, sec. 3. Wis. Stat. §§ 100.20(6) and 100.26(6). *See* Jeffries, *Protection for Consumers Against Unfair and Deceptive Business*, 57 Marq. L. Rev. 559, 560-68.

Lynch's assertion that the Legislature intended § 100.20 "to be enforced in the first

[2] Violations of rules or orders under § 100.20 can also subject the violator to criminal prosecution. Wis. Stat. § 100.26(3).

instance by the state" thus is incorrect. Respondent's brief at 21. For the first fifty years, the opposite was true.

Private consumer actions remain an essential component of the enforcement scheme crafted by the Legislature. The Wisconsin Supreme Court long ago recognized the legislative policies behind the strong remedies (double damages and recovery of attorney's fees) provided under § 100.20(5):

> We discern several purposes and policy interests behind the provisions of sec. 100.20(5), Stats. First, the recovery of double damages and attorney fees encourages injured tenants to bring legal actions to enforce their rights under the administrative regulations. Often the amount of pecuniary loss is small compared with the cost of litigation. Thus, it was necessary to make the recovery large enough to give tenants an incentive to bring suit. . . .
>
> Second, the tenant who sues under the statute acts as a "private attorney general" to enforce the tenants' rights set forth in the administrative regulations. Thus, the individual tenant not only enforces his or her individual rights, but the aggregate effect of individual suits enforces the public's rights.
>
> Third, tenant suits have the effect of deterring impermissible conduct by landlords because, if they violate the administrative regulations, they will be subject to double damages and will be responsible for costs, including attorney fees. The deterrent effect of the statute strengthens

> the bargaining power of tenants in dealing with landlords.
>
> Finally, in an amicus brief the Wisconsin Department of Justice noted that private tenant actions provide a necessary backup to the state's enforcement powers under sec. 100.20, Stats. The department pointed out that the sheer number of violations prevent it from proceeding against all violators. Private tenant actions thus constitute an enforcement mechanism reinforcing that of the justice department.

Shands v. Castrovinci, 115 Wis. 2d 352, 358-59, 340 N.W. 2d 506 (1983).

The liberal construction of consumer protection statutes like Wis. Stat. § 100.20 flows from the fact that they are remedial in nature, and "a meaningful remedy is essential to deterring the prohibited conduct and effectuating the purposes of the statute." *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶ 36, 303 Wis. 2d 258, 280. In short, remedial statutes like consumer protection laws "must be liberally construed to advance the remedy that the legislature intended to be afforded." *Stuart v. Weisglof's Showroom Gallery, Inc.*, 2008 WI 22, ¶ 21, 308 Wis. 2d 103, 746 N.W.2d 762.

Our appellate courts have repeatedly reiterated this principle, and the indispensable role of the statutory

double damages remedy for the effective enforcement of our consumer protection laws. *See, e.g., Kolupar*, *id.* at ¶¶ 34-37; *Stuart v. Weisglof's Showroom Gallery, Inc.*, 2008 WI 22 at ¶ 21; *Baierl v. McTaggart*, 2001 WI 107, ¶¶ 31-32, 245 Wis. 2d 632, 648-49; *Benkoski v. Flood*, 2001 WI App 84, 242 Wis. 2d 652, 661-66, 626 N.W.2d 851 (Ct. App. 2001); *Moonlight v. Boyce*, 125 Wis. 2d 298, 372 N.W.2d 479 (Ct. App. 1985).

As this Court has noted, Wis. Stat. § 100.20(5) "supplies the teeth to the unfair trade practices regulations promulgated under subsec. (2) of the statute." *Benkoski v. Flood*, 2001 WI App 84, ¶ 16. The approach to that statute adopted by the circuit court, if upheld here, will knock at least some of the teeth out of the statute.

II. WHEN A VEHICLE REPAIR SHOP ILLEGALLY COLLECTS PAYMENT FOR UNAUTHORIZED REPAIR, THE CONSUMER PLAINLY SUFFERS PECUNIARY LOSS IN THE AMOUNT OF THE PAYMENT.

DATCP promulgated ATCP Chapter 132 of the Wisconsin Administrative Code, "to attack the abuses

occurring in the motor vehicle repair industry." *Huff & Morse, Inc. v. Riordon*, 118 Wis. 2d 1, 3, 345 N.W.2d 504, 506 (Ct. App. 1984).[3] Chief among these abuses was the performance of unauthorized repairs. Thus "the major purpose" of chapter 132 "is to prevent *uncommissioned* repairs from being performed by repair shops. . . . The code was promulgated to prevent shops from proceeding with repairs unless they have received permission to do so." *Id.* at 9 (emphasis in original). The code encapsulates this goal through its provision that "[n]o shop may perform any repair that has not been authorized by the customer." Wis. Adm. Code § ATCP 132.02.

The rules also impose a variety of notice and recordkeeping requirements to further this aim, and punctuate the importance of the authorization requirement through a severe prohibition: "No shop may . . . .[d]emand or receive payment for unauthorized

[3] Westlaw characterizes *Riordon* as *abrogated on other grounds* by *Baierl v. McTaggart*, 2001 WI 107, ¶¶ 16, 17, 245 Wis. 2d 632, 629N N.W.2d 277, but the State respectfully disagrees. In any event, any such partial abrogation would not affect the continuing vitality of the portion of *Riordon* relevant here.

repairs, or for repairs that have not been performed." Wis. Adm. Code § ATCP 132.09(4)(e).

The rule could hardly be clearer. It is illegal to collect payment for unauthorized repair—and the customer accordingly does not owe the repair shop for such repairs. As this court held in *Riordon*, "[i]n situations where the repairs are not authorized, collection under any legal theory is prohibited." *Riordon,* 118 Wis. 2d at 11.

Although Lynch argues that Kaskin in fact authorized the repair work, the circuit court ruled to the contrary, finding in its original decision that summary judgment was unavailable because "there is a fact issue as to whether the work on the truck was done with or without the authorization of the plaintiff and at his cost." App. 102; Respondent's brief at 24.

Even assuming that no authorization was given, the circuit court, upon reconsideration, subsequently concluded that Kaskin suffered no pecuniary loss *because* of Lynch's violation, but rather the loss was caused by the bad fuel Kaskin purchased; the court also found relevant

that the repair shop "did not contribute to the problem in any way" and that Lynch charged a "fair price. App. 105. The circuit court thus found that "[t]here is no nexus between the contended violations of Chapter ATCP 132 and the repairs caused because of bad fuel." *Id.*

The circuit court's conclusion is inconsistent with both the plain meaning of the rule and Wis. Stat. § 100.20(5), as well as with applicable precedent.

Because ATCP § 132.02 explicitly prohibits repair shops from receiving payments for unauthorized repairs, the customer suffers pecuniary loss in the amount of any such payments. Since the customer does not owe the repair shop anything for unauthorized work, any amount illegally taken from the customer is a pecuniary loss caused by the violation of ATCP § 132.09(4)(e).

The state agrees with Lynch that the statutory language (here, both the rule and the statute) is plain. Respondent's brief at 16-18. However, that plain language dictates the opposite outcome from the one urged by Lynch.

The circuit court's decision cannot be reconciled with the rule that "where the repairs are not authorized, collection under any legal theory is prohibited." *Riordon*, 118 Wis. 2d at 11. Contrary to this principle, the circuit court's decision recognizes a legal theory under which the repair shop is allowed to collect payment for unauthorized repair, namely when there is an external "cause" of the repair (such as contaminated gasoline) to which the repair shop did not contribute.

Suppose that the repair shop, instead of charging for unauthorized work, charged and collected for work it never performed—*i.e.* engaged in fraudulent billing. It is self-evident that the customer would have suffered a pecuniary loss because of the shop's violation of the rule prohibiting such billing. Yet the very same rule, ATCP § 132.09(4)(e), covers both unauthorized billing and fraudulent "phantom" billing, and treats them the same. In both instances, the customer does not owe the shop for the repairs, and any payments to the shop constitute pecuniary loss flowing from the violation.

Further, Wisconsin appellate decisions in other consumer cases consistently have taken a contrary approach to the one taken by the circuit court here. For example, in *Moonlight v. Boyce*, a landlord was found to have impermissibly withheld a tenant's $165 security deposit under ATCP § 134.06. 125 Wis. 2d at 300. In calculating damages, the court found that the tenant's initial pecuniary loss was $165, the full amount of his security deposit. *Id.*

The court came to this conclusion despite the fact that the tenant owed the landlord almost $500 in damages relating to the apartment. *Id.* The court recognized that "once it is determined that the landlord has violated the Wisconsin Administrative Code provisions for the return of a tenant's security deposit, the tenant suffers a pecuniary loss under sec. 100.20(5), Stats., in the amount of the security deposit *regardless of the amount of the damages the landlord may recover on a counterclaim.*" *Id.* at 305-06.

Had the court in *Moonlight* applied the logic of the circuit court here, it would have found no pecuniary loss

under § 100.20(5) inasmuch as the tenant owed the landlord a net debt of $335, and thus arguably suffered no loss because of the rule violation. *Moonlight* reinforces the principle that where a rule prohibits the retention (in the case of a security deposit) or receipt (in the case of unauthorized vehicle repairs), the consumer suffers an actionable pecuniary loss under § 100.20(5).

This principle was reaffirmed in *Benkoski v. Flood*, 2001 WI App 84, 242 Wis. 2d 652, 626 N.W.2d 851, in which a mobile home park operator thwarted the sale of a mobile home by imposing an unreasonable condition on the sale, in violation of the ATCP rules. The operator argued that to accurately calculate the consumer's pecuniary loss the court must subtract the fair market value of the mobile home from the lost sale proceeds. *Id.* at ¶¶ 25-26.

The court rejected this approach, holding that the full purchase price of the lost sale constituted the consumer's pecuniary loss under § 100.20(5), and must be doubled (after which any offsets could be applied). *Id.* at ¶ 29. To give the operator credit for the fair market

value would in many cases "zero[] out the amount of pecuniary loss prior to applying the damage multiplier. . . ," an approach that would "not promote the purposes and objectives that lie behind the legislature's creation of the damage multiplier provision in WIS. STAT. § 100.20(5)." *Id.*

The Wisconsin Supreme Court took a similar approach to the concept of consumers' pecuniary loss in *Hughes v. Chrysler Motors Corp.*, 197 Wis. 2d 973, 542 N.W.2d 148 (1996). There the court held that in order to protect consumers as intended under the Wisconsin Lemon Law Statute and provide incentive for them to bring private causes of action, the pecuniary loss resulting from a violation of the statue must be the full purchase price of the vehicle instead of merely the consumer's out-of-pocket expenses. *Id.* at 978. Similar to Wis. Stat. § 100.20(5), the lemon law damages provision, currently codified as Wis. Stat. § 218.0171(7), authorizes the recovery of "damages caused by a violation of this section."

The court in *Hughes* concluded that the remedial nature of the statute compelled a broad interpretation of the recovery provision, observing that a narrow view of the damages provision would negate the clear legislative purpose to provide additional remedies beyond those previously available to consumers. *Hughes,* 197 Wis. 2d at 979-983.

The same principle applies with equal force here. Under the approach employed by the circuit court in this case, a consumer victimized by unauthorized vehicle repairs would be unable to obtain the remedies (double damages and attorney's fees) provided by the Legislature, but would be relegated to the common law remedies the Legislature presumably found inadequate when it enacted § 100.20(5). That is, the consumer may be able to argue the price of repair was unreasonable, but at most could recover the difference between the price paid and a judicially determined "reasonable price." Compounding matters is that, rather than being entitled to twice the illegal charge, the consumer will face the burden of proving that the price charged was excessive.

If neither double damages nor attorney's fees were available to consumers when a repair shop performs unauthorized repairs on their vehicles, the real world implications are easy to predict. With the threat of the heavy sanctions of § 100.20(5) lifted, unscrupulous repair shops doubtless will tend to slide into the prior industry practices that led to the enactment of Chapter 132 in the first place. And an injured consumer will face a difficult task finding a private consumer law attorney willing to undertake such a case.

Nor is relying on state-initiated enforcement actions the answer, as Lynch suggests. In order to obtain restitution for consumers, the state must meet the same causation standard as private consumers. Wis. Stat. § 100.20(6)(authorizing restitution for "any pecuniary loss suffered because of the acts or practices involved in the action.")

In sum, if endorsed by this Court, the approach taken below would undermine both private and public enforcement of our consumer laws. Repair shops could avoid the prohibition on collecting for unauthorized

repairs as long as they neither caused the mechanical problem (a rare occurrence) nor charged an exorbitant fee. It would defeat the important purposes behind private attorney general actions, including deterring merchants from engaging in illegal conduct. Without the risk of paying double damages and attorney's fees, it is entirely foreseeable that repair shops will slip back into the very practices that led to the promulgation of the rules in the first place.

III. REPAIR SHOPS CANNOT RECOVER UNDER QUANTUM MERUIT WHEN THE CUSTOMER DID NOT AUTHORIZE THE REPAIRS.

Lynch argues that even if it committed "technical" violations of the code, it is entitled to be paid a reasonable price under the doctrine of quantum meruit. Respondent's brief at 27-31. This argument fails.

Lack of authorization is hardly a "technical" violation, as a failure to document a verbal authorization might be. *See Riordon*, 118 Wis. 2d at 9-10 (distinguishing between violations of technical requirements and performing unauthorized work). As

Riordon held, there is no recovery for the repair shop—under quantum meruit or otherwise—if the repairs are unauthorized.

Furthermore, even if Lynch had a claim to some offsets or counterclaims, it is well-settled that those offsets are applied only *after* the consumer's pecuniary loss is doubled.[4] *See, e.g., Benkoski v. Flood*, 2001 WI App 84, ¶ 29, 242 Wis. 2d 652, 626 N.W.2d 851 (doubling pecuniary damages prior to deducting offsets, "furthers the statutory objectives behind § 100.20(5)"); *Moonlight v. Boyce*, 125 Wis. 2d at 305-06.

Thus *Riordon* squarely bars the result reached by the circuit court. This Court should reaffirm that a repair shop cannot circumvent the prohibition against collecting payment for unauthorized work through the principle of quantum meruit.

---

[4] This method of calculating consumer damages is the widely accepted model for a multitude of other jurisdictions and statutes including the federal RICO and antitrust statutes. *See, Ameripride Linens & Apparel Serv. V. Eat Well, Inc.*, 836 N.E.2d 1116, 1120-23, n.10. (Mass. App. Ct. 2005); *State v. Singer*, 904 A.2d 1184, 107-10 (Vt. 2006)(collecting cases).

CONCLUSION

For the reasons stated above, the state respectfully requests that the Court reverse the decision below, and remand the case for trial to determine, among other things, whether Kaskin in fact authorized the repair work at issue.

Dated this 1st day of December, 2008.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

JOHN S. GREENE
Assistant Attorney General
State Bar No. 1002897

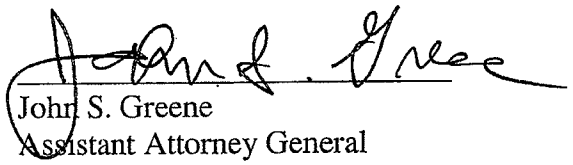
Attorneys for *Amicus Curiae*
State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8901
(608) 266-3936

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,969 words.

Dated this 1st day of December, 2008.



John S. Greene
Assistant Attorney General

Herrick & Kasdorf, L.L.P.

Patricia Hammel
Scott N. Herrick *Court Commissioner*
Robert T. Kasdorf *Trustee in Bankruptcy*
Juscha Robinson
David R. Sparer

Robert L. Reynolds, Jr. (1930-1994)

Law Offices
16 N. Carroll, Suite 500
Madison WI 53703

Peter Zarov *of counsel*
Roger Buffett *of counsel*

October 19, 2011

TO: Senate Committee on Judiciary, Utilities, Commerce and Government Operations

FROM: Attorney David R. Sparer

RE: Opposition to Senate Bill 12

- Shifting of attorney fees in consumer cases encourages private citizens to enforce the consumer protection laws. The State, through the Attorney General's office, is unable to provide the staffing needed to enforce these laws, and only citizens acting as "private attorneys general" are capable of enforcing those rights for themselves and for all citizens throughout the state. This is the finding and ruling by our Supreme Court in ***Shands vs. Castrovinci***, 115 Wis.2d 352, 340 N.W.2d 506 (1982), relying in part upon an amicus brief from the Attorney General asserting the need for private attorney general enforcement.

- **Fee shifting statutes *do help* settle cases early, and prior to trial.** In over 30 years of practicing law, I have handled hundreds of these types of cases, and can report of my own experience that a large percentage of these cases do settle specifically because of the fee shifting statutory provisions.

- I have handled many cases for tenants where the dollar amount was relatively small, but the landlord fought the effort to enforce the law, and appealed the rulings in favor of the tenant at each level. Only a fee shifting statute would have made a defense of the tenant's rights feasible in these cases. In one such case the landlord appealed all the way to the Supreme Court over $100 security deposit.

- Fee shifting only occurs after a court has heard all the evidence and determined that the landlord or business operator has indeed engaged in unfair and illegal activity. Limiting the ability to prosecute these law violators helps only one segment of our community, those who commit frauds and consumer protection violations against our citizens. No other segment will be protected or benefit by this legislation.

I hope that you will vote against this ill conceived bill, and maintain the only enforcement mechanism for these laws, private attorneys general actions. Thank you.

(608) 257-1369
fax (608) 250-4370
voicemail extension: 228
sparer@herricklaw.net

In order to decide whether the statute requires an award of attorney fees for appeals, we must determine *358 whether such awards would be commensurate with the purposes of the statute and, more generally, with public policy. We discern several purposes and policy interests behind the provisions of sec. 100.20(5), Stats. First, the recovery of double damages and attorney fees encourages injured tenants to bring legal actions to enforce their rights under the administrative regulations. Often the amount of pecuniary loss is small compared with the cost of litigation. Thus, it was necessary to make the recovery large enough to give tenants an incentive to bring suit. The award of attorney fees encourages attorneys to pursue tenants' claims where the anticipated monetary recovery would not justify the expense of legal action. While attorneys generally are willing to perform pro bono legal services in appropriate cases, we recognize that practical considerations limit the number of such suits.

Second, the tenant who sues under the statute acts as a ""private attorney general"" to enforce the tenants' rights set forth in the administrative regulations. Thus, the individual tenant not only enforces his or her individual rights, but the aggregate effect of individual suits enforces the public's rights.

Third, tenant suits have the effect of deterring impermissible conduct by landlords because, if they violate the administrative regulations, they will be subject to double damages and will be responsible for costs, including attorney fees. The deterrent effect of the statute strengthens the bargaining power of tenants in dealing with landlords.

Finally, in an amicus brief the Wisconsin Department of Justice noted that private tenant actions provide a necessary backup to the state's enforcement powers under sec. 100.20, Stats. The department pointed out that the sheer number of violations prevent it from proceeding against all violators. Private tenant actions thus *359 constitute an enforcement mechanism reinforcing that of the justice department.

A tenant action brought under sec. 100.20(5), Stats., is not successful until he or she has actually recovered damages and attorney fees. The trial court's decision may have to be defended, or an adverse decision protested, in an appellate forum. The same purposes and policy interests we identified for the original action attach to the appeals process. To permit the recovery of attorney fees for successful appellate work is simply to recognize that an attorney's effort at that stage is as essential to the tenant's success as is an attorney's work at the trial court level. Furthermore, we recognize that, if attorney fees were not recoverable on appeal, landlords could defeat the statutory purposes by the simple expedient of an appeal, which will be prohibitively expensive for many tenants; similarly, tenants would have little incentive to pursue a meritorious claim on appeal where they had not prevailed at the trial court level. In short, to deny attorney fees to tenants who need to pursue appellate review to enforce their rights would undercut the salutary objectives of the statute.

Shands v. Castrovinci 115 Wis.2d 352, 357-359, 340 N.W.2d 506, 509 (Wis.,1983)

To: Committee on Judiciary, Utilities, Commerce, and Government Operations

From: Frances Reynolds Colbert, Consumer Protection Law Office LLC
849 E. Washington Avenue, Suite 212
Madison, WI 53703
608-661-8855; frances@wis-consumer.com

Re: Statement against Senate Bill 102

Date: October 19, 2011

I am a consumer law attorney in Madison, Wisconsin. My practice is a 100% contingency based practice. A large percentage of our clients are indigent and are often referred to us from legal aid organizations. A significant portion of my job is counseling potential clients, at no cost, and explaining to them why litigation will not help solve their problems. I encourage potential clients to do everything in their power to resolve their disputes. Even when clients appear to have meritorious claims, I often direct them to the Basic Guide to Small Claims Action available on the Wisconsin Courts website and encourage them to bring the action without involving an attorney. The kinds of cases I do take are disputes where there are per se violations of the law, often involving situations where predatory businesses are systematically taking advantage of individuals.

Access to judicial system will be severely compromised if this bill goes through. Wronged consumers are often unsophisticated and need assistance to navigate their cases against defendant corporations whose net worth is often in the multi-millions.

The vast majority of cases settle early and attorney fees are relatively small – in fact, often within the limit proposed. In our practice, the only time fees are significant is when the opposing side has unnecessarily ramped the litigation. For example, in a landlord-tenant case where the pecuniary loss was under $700, the landlord refused to settle despite per se violations of the law. The litigation that followed revealed the landlord was lying under oath and in addition to wrongfully withholding a security deposit, had committed fraud on his tenants. Lastly, we keep meticulous records of costs and fees. Fee petitions are reviewed by courts and only granted if they a determination that they are reasonable.

The Wisconsin Supreme Court has repeatedly recognized the importance of the award of attorneys fees in private consumer law actions:

- Because in consumer law matters the pecuniary loss is small in proportion to the costs of litigation, consumers would never bring cases even when there were blatant violations of the law.
- Private consumer lawyers act as "private attorneys generals." The aggregate effect of enforcing individual rights enforces the public's rights.
- The award of attorneys fees has a deterrent effect on predatory businesses. If they only had to pay out the pecuniary losses, then they would continue their bad acts.
- The Department of Justice is overloaded and simply cannot ensure consumer protection with out the aid of private actions.
- *Shands v. Castrovinci*, 115 Wis.2d 352 (1983).

disabilityrights | WISCONSIN

To: Senator Zipperer, Chair, Senator Kedzie, Co-chair and members of the Senate Committee on Judiciary, Utilities, Coommerce and Government Operations

From: Jodi Hanna, Supervising Attorney, Disability Rights Wisconsin

Subject: DRW opposes Special Session SB 12

Date: October 19, 2011 Room 411 South

Disability Rights Wisconsin opposes Special Session SB 12, which will sets out a set of rigid factors to determine reasonable attorneys fees for a prevailing party. As a result of SB 12, people with disabilities seeking justice and protection from discrimination will find it even more difficult to find legal representation. We are particularly concerned about the factors requiring courts to limit the award of attorney fees in relation to the amount of compensatory damages and the requiring courts to award fees based on whether the fee was fixed or contingent.

Disability Rights Wisconsin is Wisconsin's designated protection and advocacy agency for people with disabilities. We serve people with all types of disabilities and ages throughout Wisconsin. Of relevance to this issue, I serve as an attorney on DRW's civil rights team, which means that I primarily provide advice and representation to workers with disabilities experiencing employment discrimination and tenants facing housing discrimination.

Today I want to focus on workers who are victims of employment discrimination based on disability. It is very difficult for these workers to find an attorney to represent them in their claim. Often workers with disabilities do not have large damages, rather they seek reasonable accommodations or rehire or promotion that they were denied. They typically do not have the funds for an attorney because they may have been put on unpaid leave or fired by the discriminating employer. Wisconsin has a small but dedicated group of attorneys who represent employees in these cases. They generously provide sliding scale fees and some work on contingency. They are able to accept cases because if successful, their clients can seek attorneys fees and costs. Our agency is a non-profit; funding and staffing limit our ability to individually represent many people. We rely on referrals to these private attorneys. Limiting the recovery based on the compensatory damages or because the case was taken on contingency will hurt people with disabilities by limiting their access to legal representation. It is not fair to close the door to justice for those who have minimal compensatory damages claims. Wisconsin's protections from illegal disability discrimination are enforced by private citizens with disabilities. A successful plaintiff with disabilities asks for reasonable attorneys fees so that the cost of discrimination and enforcement is placed upon the wrongdoer. This is one of the only ways that a victim of disability discrimination can seek justice.

MADISON OFFICE

131 W. Wilson St.
Suite 700
Madison, WI 53703

608 267-0214
888 758-6049 TTY
608 267-0368 FAX
800 928-8778 consumers & family
disabilityrightswi.org

TO: Committee on Judiciary, Utilities, Commerce and Government Operations

From: DeVonna Joy
Consumer Justice Law Center, LLC
P.O. Box 51
Big Bend, WI 53103-0051
262-662-3982
consumerjusticelaw@wi.rr.com

Re: SB-12 Proposed Legislation Capping Attorney's Fees

Date: October 19, 2011

I am a consumer protection attorney from Muskego, WI, practicing throughout Wisconsin. Today I am here to oppose SB-12, proposing to cap attorney's fees in fee-shifting cases to three times the amount of an award.

I represent your constituents who have been victimized by illegal, fraudulent, unscrupulous and deceptive practices. The faces of my clients include:

- the elderly who are preyed upon by door-to-door or telephone sales scams
- Wisconsin citizens who are sold timeshares using high-pressure sales tactics filled with misrepresentations
- honest and financially overburdened consumers owing bills to creditors -- who are persuaded to transfer what little money they have to supposed debt settlement companies who promise to pay the consumer's creditors, wipe out large portions of the debt, and restore the consumer's credit standing -- only to have the debt settlement company take the lion's share of the proceeds as

profits, ***not*** negotiate with (or even contact) the creditors, and leave the consumers subject to lawsuits by their creditors who now have also been cheated out of payment

- an elderly woman who took her one-year-old car under warranty in for a minor repair and was given paperwork which put her into a lease of a brand new car instead of receiving the loaner she expected
- victims of identity theft who are harassed by abusive debt collectors trying to squeeze money out of these consumers who don't care that the debt was not incurred by consumer
- the young couple who paid $2,800 down on a used car without realizing that the car dealer had covered up an illuminated "check engine" light with black marker to hide the defect -- and who then refused to refund the money or replace the car when caught
- the young single mother who unknowingly bought a rebuilt wreck shipped up from another state where the dealer "washed" the title to hide this disclosure.

These are my clients. They are also your constituents. They typically have been to many lawyers unsuccessfully trying to get someone to take their cases before they find a consumer lawyer who is willing to work contingent upon success. There aren't too many of us. In these cases, my compensation is both

contingent (upon the consumer winning her case) and deferred -- until the end of the case. These cases often have a low monetary value comparable to other types of legal matters. They are not huge cases.

But my young couple measure out $2,800 very carefully; it's a lot of money to them. And that case did go to trial. The car dealer could have settled the case for our first offer -- return the money. We didn't even request fees. Instead, the dealer fought very, very hard in a week-long trial -- making the case expensive to litigate. The jury awarded approximately $16,000 to my clients -- and the attorney's fees and costs awarded were over $100,000. I could not have helped these people if they had to pay the attorney's fees out of their own pocket. And the business knew that. They just kept fighting harder and harder.

This issue is not about attorney's fees. Attorneys who cannot take these cases will simply do other kinds of cases. It is about whether you will protect the rights of the common ordinary citizen of Wisconsin to get justice when they are cheated and victimized by unscrupulous business practices.

This issue also is not about "Consumers vs. Businesses." Most businesses operate honestly. Customer satisfaction is important to them. If there is a problem with a service or merchandize, the honest business will work with the consumer to resolve the problem. Instead, this is about honest businesses and consumers vs. the

cheating businesses. Because honest businesses are put at a competitive disadvantage when illegal practices are permitted to flourish.

A car dealer who rolls back odometers can sell a ***really*** used car for a higher price than its value. A debt collector who uses scare tactics, threats and illegal tactics such as blabbing about the consumer's debt to his neighbors and family members can intimidate the consumer into paying **that** bill, rather than to the polite creditor or debt collector who doesn't violate the law. Companies who don't violate consumer protection laws should not be put at a competitive disadvantage because illegal business practices are allowed to flourish.

For most people, the thought of going to court is terrifying. They do not have legal training, and if they cannot find representation, they simply cannot figure out how to get justice for the fraud and abuses they may have suffered. If you take away their ability to find someone to take their case, you send a message to everyone. You are telling Wisconsin citizens that they just don't matter -- that it is just too bad if they've been cheated. You are telling the Attorney General's Office that if it wants to curb any of those abuses, it will have to hire more assistants at taxpayer expense, because you've just removed the "private attorney general" component of consumer protection law -- to make the wrongdoers pay for their illegal actions, rather than the taxpayers or victims. And if the State doesn't have

the money for that (which it does not), you are telling businesses who may be inclined to break the law that it is open season on Wisconsin consumers. And you are telling honest businesses that if they want to compete with the dishonest businesses and engage in some of those tactics themselves in order to increase profits, you will look away and not hold anyone accountable. I urge you not to do so.

There are already checks and balances in the system to avoid litigation abuse. If plaintiffs in fee-shifting cases do not have a good case, they will lose. Their attorney does not get paid. The legislature has already revised the law to make it easier for judges to weed out frivolous claims. And there already is a working system in place requiring prevailing consumers to prove up their entitlement to their attorney's fees claimed in a fee-shifting case. Defendants already can oppose any fee claim that might be over-reaching, and that is why we have judges, who have been involved in the case all along, to assess reasonable attorney's fees and cut them if appropriate, based upon factors already in place.

I urge you to oppose SB-12. Thank you for the opportunity to be heard.

FONS LAW OFFICE

500 South Page Street
Stoughton, Wisconsin 53589

Mary Catherine Fons
Lawyer

Telephone: 608-873-1270
Facsimile: 608-873-0496

October 19, 2011

Re: Special Session SB 12: Hearing of the Committee on Judiciary, Utilities, Commerce, and Government Operations

Dear Chair Zipperer and Members of the Committee:

I am a lawyer in a solo private practice. I handle consumer protection cases for Wisconsin citizens. As the legislature and courts for years have intended, my clients are private attorneys general. They do not use any taxpayer or government agencies, services, organizations or money to prosecute violations of law. They seek redress directly from the wrongdoer, and if they prove the law was violated they collect what the law allows. No government agency needs to be set up to enforce the laws, private citizens are doing it. The process has been working well for those citizens who are able to locate a lawyer to help them. Businesses that follow the law do not face payment of damages, costs and attorney fees. Businesses that violate the law must pay the damages and the costs of enforcement.

SB 12 encourages violations of consumer protection laws by removing the mechanism set up to make sure that Wisconsin consumer protection laws are actually enforced. It gives a dishonest business a competitive advantage over a business in compliance with the law because if dishonest business practices are not quashed, then those who are willing to engage in them are at a competitive advantage to those who follow the law.

Here are some examples of Wisconsin citizens who I would not have been able to serve to enforce the consumer protection laws if the current fee shifting mechanism was not in place:

1.. A couple from Fort Atkinson was the subject of illegal sales practices by a timeshare company in Wisconsin Dells. The couple paid $7,500.00. The company defended litigation vigorously, including an appeal to the court of appeals. I worked on their case for more than six years.

2. A married couple, farmers in Stitzer, were the subject of illegal debt collection practices by a farm creditor. It took one year of contentious litigation for them to be able to enforce the debt collection laws.

3. A woman in Horicon had been a tenant. The previous landlord refused to return her security deposit of $350.00 and made false claims against her for damages to the property. She was facing a lawsuit for damages she did not cause. We were able to resolve this when I agreed to represent her and set forth the legal basis for all of the issues. The landlord decided not to defend, returned the security deposit, and dropped the lawsuit.

4. A woman in Johnson Creek purchased a vehicle from a Janesville car dealership after the salesman said she had 3 days in which to cancel. She wanted to see if the car worked for her mail delivery job. The size did not work, and the dealer would not honor her timely cancellation. We

litigated for just short of 3 years before the dealer agreed to cancel the deal and pay her damages. The dealer, like all companies, could have tried to resolve the case when I wrote a letter asking to resolve it before the lawsuit was ever filed. My letter was ignored.

5. A man in Janesville co-signed a car loan for his adult son and the son had problems making timely payments. A Minnesota debt collection agency called my client and said he would be arrested that day for not paying the bill before my client had a chance to look into what was happening. The collector also called his employer (which was also his church) and told people there that my client does not pay his bills. It was the enforcement mechanism of the attorney fees that allowed me to represent this man to help him prosecute the debt collector.

6. A jury found that a Credit Union, now no longer in business, lied to my client from Janesville to get him to sign loan documents which caused him to have to wrongfully give up a vehicle. I could not have helped this man all the way through a jury trial if attorney fees were not available if we won.

7. A woman from Monroe was sued in by a company that claimed it held a loan for windows that had been installed in her deceased husband's home. She had tried to write an answer on her own behalf, but the Court did not acknowledge receiving it and granted default judgment against her. I helped her get the case reopened and put in her legal defenses. Being presented with the legal defenses, the company dropped the suit. This woman went from having a judgment against her (which is a lien on her home) to being free of the alleged debt, due to the fact that she had an attorney to help her.

These are just a handful of folks who I was able to represent because of the consumer protection fee shifting provisions. We should not take away Wisconsin citizens' ability to prosecute law violators. We should not give a competitive advantage to those businesses willing to violate the law. Please stop any further action on SB 12.

Thank you.

Mary Catherine Fons

Mary Catherine Fons
Attorney at Law

Fons Law Office
500 South Page Street
Stoughton, WI 53589
608-873-1270
mfons@chorus.net

I apologize for not being there in person as I am unable to take off from work. I'm urging you to please not pass this bill as I believe it will negatively impact the ability of the average consumer to stop predatory business practices.

A few years ago my sister and I bought my mom a new scooter for her 60th birthday. She would periodically mention her wish to have a scooter and as her milestone birthday approached my sister and I decided to get her one. She was thrilled when we surprised her. Unfortunately, the weather in April that year was cold so we stored her brand new scooter in the garage. About a month later when it finally warmed up, mom went to take her scooter out for a ride but it wouldn't start. I researched mechanics that were willing to fix the model of scooter we had. I found one and called them up. The mechanic said they could fix any scooter and told me to drop it off so they could look at it. We were told it would take two weeks to fix at the most. Unfortunately, those two weeks turned to months as the mechanic said the part our scooter needed had to be shipped in from China. I would call every few weeks to check on the status of the scooter until my mom got sick. She was diagnosed with stage four cancer. As you can imagine most of my energy and time went into caring for her. During the time my mom was sick I never once received a call from the mechanic informing me on how the repairs were going. To say the least, I was suspicious but I had more pressing matters to attend to. I had four months with my mom until she passed away. As I was tending to the things she left behind I couldn't help but think how awful it was that my mom never got the opportunity to enjoy the present my sister and I bought her. We decided to cut our losses and take the scooter back home to sell it to someone who knew how to fix it. When I arrived at the mechanics shop, I was shocked and angry to see that the brand new scooter I had left with him nearly a year ago now looked used and beat up. The seat was sun faded, the handlebar grip was missing, a rag was stuffed into an intake pipe and there were large, deep gashes to the paint on the front and the back. I was horrified. I felt this mechanic had robbed my mom of her last chance to enjoy her scooter. I was at a loss of what to do so I contacted David Dudley at the consumer law office for help. He took my case and spent a tremendous amount of time and effort to stop this mechanic from taking advantage of someone else. David did a fantastic job and won the case. The dollar value for the damages my sister and I incurred was around $600. Reclaiming the money I had lost to repair the scooter was not the most important thing to me. What mattered most from winning the case was the fact that I gained a sense of closure. This mechanic had taken advantage of my mom and robbed her from what could have been an enjoyable time riding her new scooter before she got sick. She could have savored those memories while she lay in bed getting weaker. She never got that chance and I found it hard to come to terms with. If I had not had David's help those thoughts would have haunted me for the rest of my life. I would have always regretted taking her scooter to the mechanic who kept promising to fix it but never followed through. Winning the case helped put my mind at ease and it made this mechanic realize that he couldn't take advantage of people and get away with it. I took comfort in knowing that justice had been served. If the bill being presented today is passed, I believe no attorney would have taken my case. The dollar amount was low but the emotional cost was high. The attorney's fees for the amount of time needed to prepare my case would not have been recovered if the fee cap suggested in this bill was in place. It just wouldn't be cost effective for any lawyer to take my case. I would have just had to bitterly live with the guilt and anger over the horrendous treatment we received for the rest of my life. I, again, please urge you not to pass this bill as

I feel a case like mine would never have seen the light of day and the mechanic who took advantage of my family would have continued with his predatory business practices. Please do not let that happen. Thank you for your time.

Brianna Modersohn 10/18/11

Brianna Modersohn

806 Twin Pines Dr.

Madison, WI 53704

815-703-4761

Date: October 19, 2011
To: Committee on Judiciary, Utilities, Commerce, and Government Operations
From: Meridith Mueller

I urge you to oppose Senate Bill 12 relating to factors for determining the reasonableness of attorney fees. Capping attorney fees will be detrimental to Wisconsin consumers by significantly limiting legal representation. This will not go without consequence since hard working individuals and small businesses will be at greater risk for unfair practices and will have little recourse. There will be minimal personal responsibility for those who take advantage of Wisconsin consumers.

Recently, I was a victim of predatory practices and my consumer protection rights were being violated. Without legal representation I would have been strong armed into signing a contract that clearly deviated from the original agreement, and would have experienced an unjust monetary loss. If this bill had been enacted during this time, it would have prohibited me from protecting my consumer protection rights. This would have occurred not because of the merit of the case but due to the fact that I would not have been able to afford legal counsel. Likewise, it would have been difficult for an attorney to take on my case.

It is clear what the Committee on Judiciary, Utilities, Commerce, and Government Operations must do; reject this reckless bill and stand up for Wisconsin consumers.

Regards,

Meridith Mueller

My name is Johnny Kimble, Jr. I am currently retired. I was employed by the State of Wisconsin Equal Rights Division for over 32 years. For several years prior to my retirement, I supervised a staff of 11 to 14 who investigated complaints involving approximately 38 different laws regulating employment.

One of the major problems for the public we served was their ability to access competent legal counsel.

Senate Bill 12 will, in my opinion, have a detrimental impact on the most vulnerable classes of people in this state because it will further diminish their ability to hire competent legal counsel to represent them in situations where it appears the state's fair employment laws have been violated.

Senate Bill 12, as currently written, requires legal counsel to peer into the future to determine the outcome of the case they are considering prior to the case being tried. If their potential client does not have the financial means to cover any legal fees not awarded by the court, out of financial necessity attorneys will likely choose not to represent low-income people, thus depriving them of their right to seek legal action against employers who may have violated fair employment laws.

I strongly object to Senate Bill 12 because I believe it will deprive low-income people of legal counsel in cases where their rights have been violated due to their lack of ability to pay cash for legal counsel.

I believe Senate Bill 12 is unjust because it will affect the ability of the poor to get legal representation.

UNIVERSITY of WISCONSIN LAW SCHOOL
975 Bascom Mall
Madison, WI 53706-1399

To: Members, Senate Committee on Judiciary, Utilities, Commerce and Government Operations

From: Sarah J. Orr, Director, Consumer Law Litigation Clinic
(608) 890-2454, sorr@wisc.edu

Blythe Kennedy, Student Intern

Re: Opposition to Senate Bill 12 on Capping Reasonable Attorney's Fees

Date: October 19, 2011

The Consumer Law Litigation Clinic has served Wisconsin consumers for many years through legal representation, education and advocacy. In 2011, clinic students will handle approximately 300 calls from people with consumer-related problems. This does not include the many homeowners we assist at the drop-in Foreclosure Clinic, some of whom were misled into unsuitable mortgages. Unfortunately, the clinic's limited resources allow us to represent only a small number of those seeking our help. For this reason, we select cases involving systemic issues such as illegal debt collection practices where our work can have the broadest impact. We refer many meritorious cases to private consumer protection attorneys. We oppose Senate Bill 12.

The clinic's clients can least afford to be defrauded, harassed and ripped off. Many are one unexpected expense away from financial catastrophe. They cannot pay an attorney to represent them in any legal matters. The consequences of illegal practices are tangible and harsh. For example, the clinic represented clients whose only car was illegally held by a repair shop. The sole wage-earner lost his job because he could not get to work without the car. The family ultimately split up, and the mother and kids moved to a shelter. We represent working parents who are desperately afraid they will lose their jobs or the confidence of their supervisors because debt collectors repeatedly contact them at work, an explicitly prohibited tactic. The debt collectors have ignored their requests to stop these contacts. These clients can

recover statutory damages under the Wisconsin Consumer Act. The amounts may seem small, but they make a big difference to our clients.

But we are all at risk in today's marketplace. The financial services industry, online commerce and the electronic buying and selling of debt have simultaneously become more sophisticated and increasingly prone to error and unscrupulous practices. We have lost any bargaining power in our everyday transactions. Yet the legislature has entrusted each of us to enforce important public policies against fraud, misrepresentation, deception and harassment. All consumers benefit when fee-shifting statutes enable those with meritorious claims to proceed in court. It helps level the playing field.

Capping attorney fees at three times the amount of damages will both encourage companies to engage in practices that the legislature has declared unacceptable in Wisconsin and prevent consumers from enforcing their rights when they are harmed by those practices. Out-of-state companies with no stake in Wisconsin's economy or the welfare of its residents will benefit from the changed formula for determining reasonable fee awards. It will make illegal practices more financially viable than abiding by the law. Enacting the bill also will diminish a wrongdoer's incentive to settle a Wisconsin consumer's claims because its liability for attorney fees will remain fixed well below the resources the attorney devoted to the case.

If this bill moves forward, Wisconsin's leadership in protecting the rights of consumers will be eclipsed by an unprecedented abdication of its responsibility to ensure fair practices for its citizens and business community.

My student Blythe Kennedy will share a client's story, which conveys our message more poignantly than we can today.

We urge you not to pass this bill. Thank you for your consideration.

My name is Blythe Kennedy, and I am a 2nd year law student and intern at the Consumer Law Litigation Clinic at the University of Wisconsin Law School.

I am here today to discuss one of our clients, who, for purposes of anonymity will be referred to as "Julie." Julie is an incredibly bright, hardworking young woman. She is a single mother of two, and a student currently working two jobs. In the past she has faced dire financial struggles, and like many Wisconsin consumers, sought relief through a payday loan. The company, whose name I will not reveal, is headquartered outside of Wisconsin, and has become notorious for their many, flagrant violations of Wisconsin consumer law. Just to give you a brief snapshot of this company's practices, last Friday they called Julie's mother 18 times, threatening to have her daughter thrown in jail. In addition, they called Julie a "bitch" and a "liar" and claimed they had a warrant for her arrest. Julie and her mother have been contacted this way almost every day for months now. Unfortunately, such hostile harassment tactics are not atypical. Although the Wisconsin Consumer Act allows for recovery of up to $1,000 per violation, litigating such claims takes significant time and resources.

Julie intends to pay back the loan and hopes to work out a payment plan with the company. She has also sought help through Habitat for Humanity and Greenpath Debt Solutions. She is working with financial counselors on budgeting and repairing her credit, and trying to find a suitable home for her family. She is trying to do the right thing, and this loan company is treating her like garbage either because no one has told them that their conduct is illegal, or they have chosen to simply ignore the law. Again, this behavior is not atypical. We rely on consumers like Julie to act as private attorneys general and stand up against illegal practices. I fear that this change will prevent consumers from bringing their claims as lawyers will no longer be able to be paid for their services to clients like Julie. Thank you for taking the time to hear Julie's story, and a student's perspective.